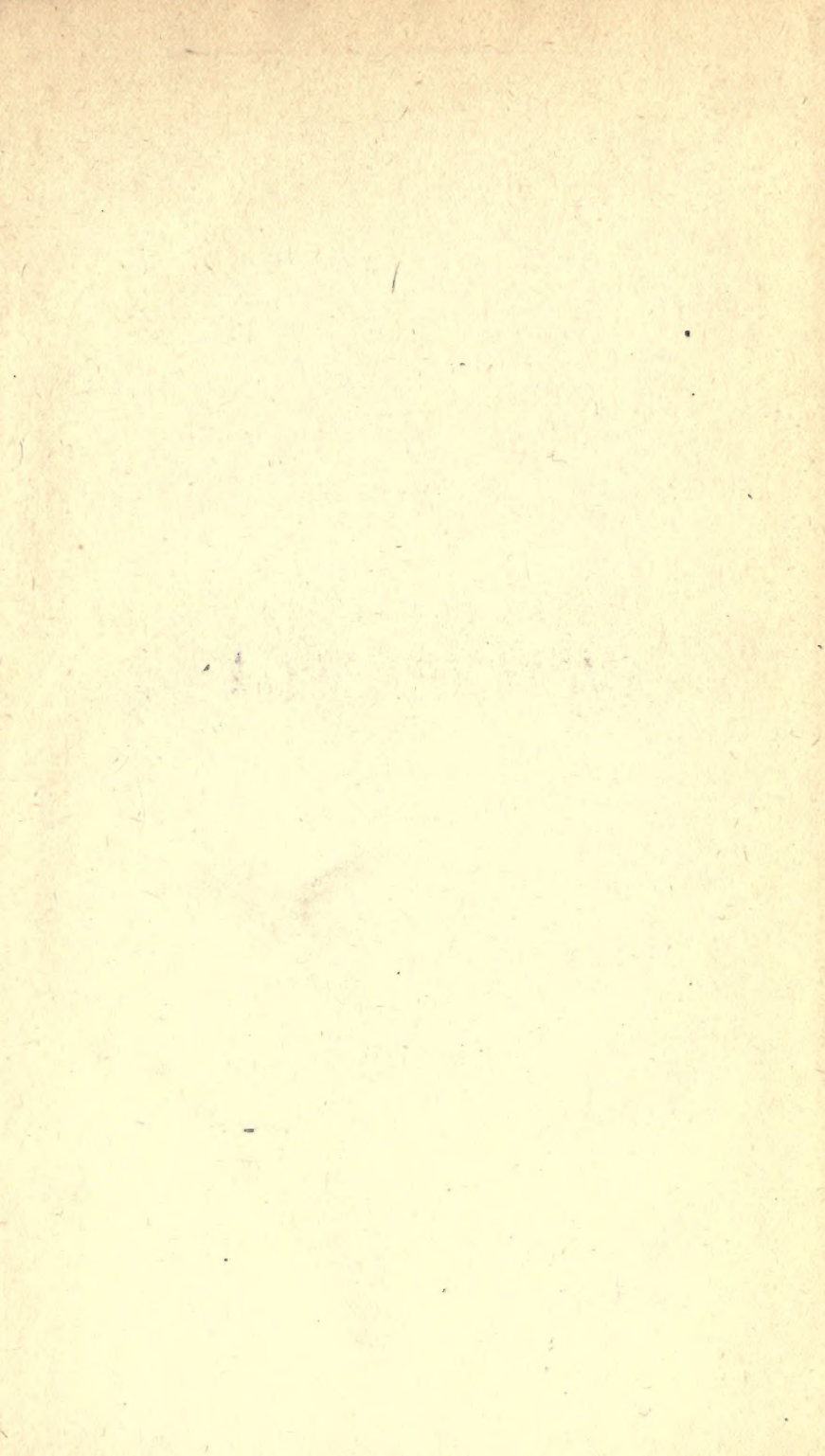


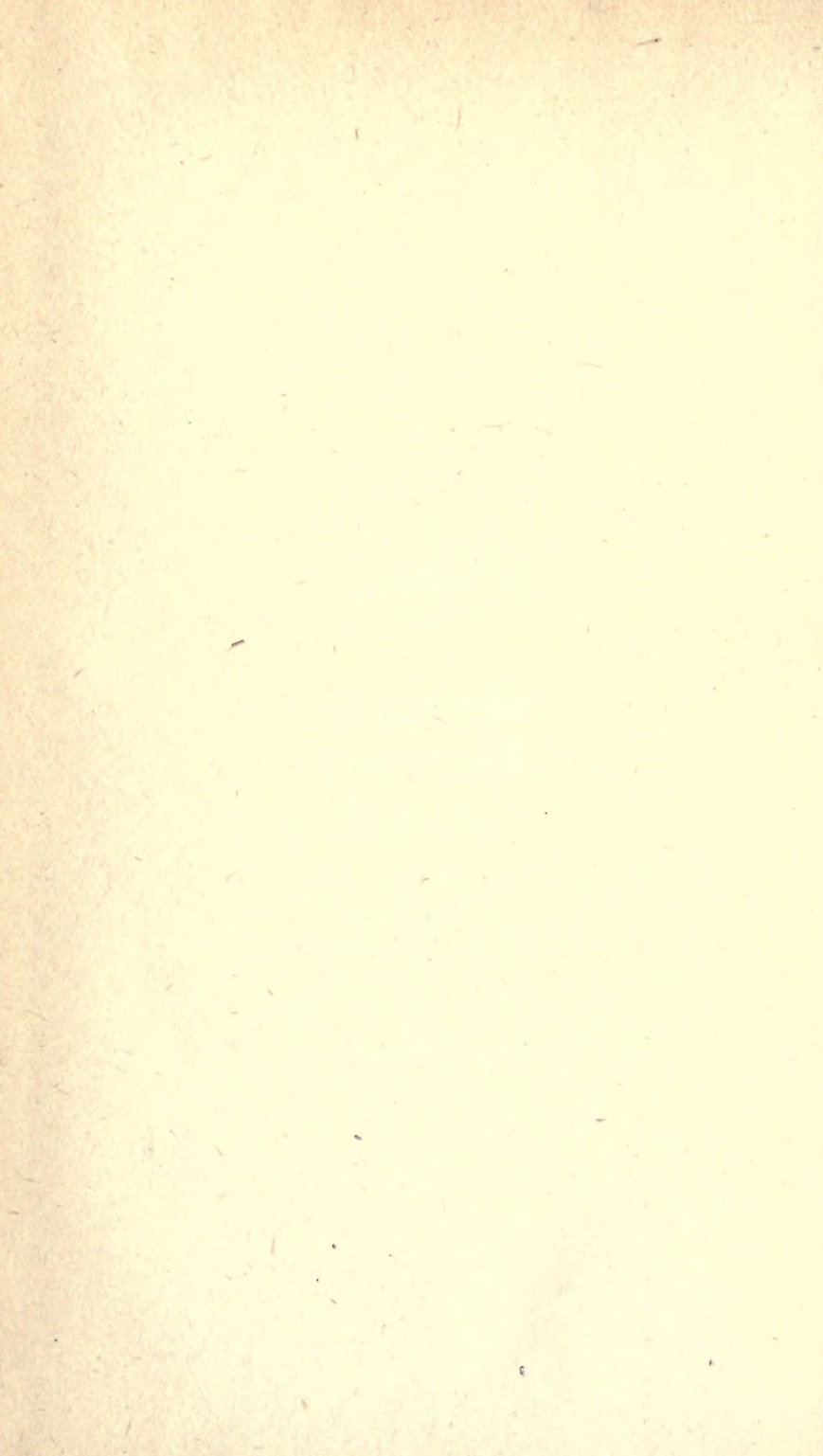


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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS.

VOL. IV.

CONTAINING CASES IN 1846.

HERRICK & ALLEN

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NAMES OF THE JUDGES, &c.,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. STEVENSON ARCHER, Chief Judge.
Hon. THOMAS BEALE DORSEY, Judge.
Hon. E. F. CHAMBERS, Judge.
Hon. ARA SPENCE, Judge.
Hon. ALEXANDER C. MAGRUDER, Judge.
Hon. ROBERT N. MARTIN, Judge.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles and Prince George's counties.*

Hon. ALEXANDER C. MAGRUDER, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. CLEMENT DORSEY, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne and Talbot counties.*

Hon. E. F. CHAMBERS, Chief Judge.
Hon. PHILEMON B. HOPPER, Associate Judge.
Hon. JOHN B. ECCLESTON, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel, Montgomery and Carroll counties.*

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. THOMAS H. WILKINSON, Associate Judge.
Hon. NICHOLAS BREWER, do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset and Worcester* counties.

Hon. ARA SPENCE, Chief Judge.

Hon. WILLIAM TINGLE, Associate Judge.

Hon. BRICE J. GOLDSBOROUGH, do.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington and Allegany* counties.

Hon. ROBERT N. MARTIN, Chief Judge.

Hon. RICHARD H. MARSHALL, Associate Judge.

Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore and Harford* counties.

Hon. STEVENSON ARCHER, Chief Judge.

Hon. JOHN PURVIANCE, Associate Judge.

Hon. JOHN C. LE GRAND, Associate Judge.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.

Hon. ALEXANDER NISBET, Associate Judge.

Hon. W. G. D. WORTHINGTON, do.

ATTORNEY GENERAL.

Hon. GEORGE R. RICHARDSON.

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

Ankeney, Henry, and William Craig, and Jacob Angle, Jr.,	- 225
Annapolis and Elkridge Rail Road Company and George McCullough,	58
Annan, Robert, <i>vs.</i> Ezra Houck,	- 325
Barnes, Abraham, et ux., J. T. Mason, et ux., Lynch and Craft, et	
al., &c., and John Doub,	- 1
Barnes, Richard, and Robert Fergusson, exc'rs of John Barnes, and	
Wilson Compton,	- 55
Barry, Samuel M., and Patrick Crowley,	- 194
Barrick, Jacob, and others, and David S. Middlekauf,	- 290
Bell, David, <i>vs.</i> The State of Maryland, use of William Miller,	- 301
Bevans, John, <i>vs.</i> William Sullivan, Peter Ritner, and Thomas Beers,	383
Brewer, Jacob, of John, and George Keefer, terre-tenants of James	
Prather, and George F. Warfield, use of Jonathan Manro,	- 265
Browner, William H., and Mary C. Browner, his wife, <i>vs.</i> Elkanah F.	
Franklin, Joseph H. and Sarah Franklin,	- 463
Brookes, John, <i>vs.</i> Zadock C. Chesley,	- 205
Brooke, John B., and Thomas B. Crawford, and David Crawford,	
adm'rs of David Crawford,	- 213
Buckingham, Beale, <i>vs.</i> Benedict and Nicholas G. Clary,	- 223
Buck, Benjamin A., <i>vs.</i> Michael Doyle,	- 478
Burgess, Teresa, adm'x of Thomas Burgess, and John Lloyd, adm'r of	
Thomas Janney, survivor of J. D. Brown,	- 187
Burton, W. E., C. S. T. Burke and wife, <i>vs.</i> E. A. Marshall,	- 487
Campbell, George, and William Harden,	
Chapman, John G., adm'r of Samuel Chapman, <i>vs.</i> Elizabeth G. Da-	
vis, exc'x of Thomas A. Davis,	- 166
Chesley, Zadock C., and John Brookes,	- 205
Clary, Benedict, and Nicholas G., and Beale Buckingham,	- 223
Craft, Hugh, <i>vs.</i> Henry Wilcox, et al.,	- 504
Craig, William, and Jacob Angle, Jr., <i>vs.</i> Henry Ankeney,	- 225
Crawford, Thomas B., and David Crawford, adm'rs of David Craw-	
ford, <i>vs.</i> John B. Brooke, trustee,	- 213

Compton, Wilson, guardian of Barnes Compton, <i>vs.</i> Richard Barnes and Robert Fergusson, executors of John Barnes,	-	-	55
Crowley, Patrick, <i>vs.</i> Samuel M. Barry and John Hurst,	-	-	194
Cunningham, Joseph, and others, <i>vs.</i> Nicholas W. Spickler and others,	-	-	280
Davis, Elizabeth G., exc'x of Thomas A. Davis, and John G. Chapman, adm'r of Samuel Chapman,	-	-	166
Dawes, Edward, <i>vs.</i> Evan Thomas,	-	-	325
Dilley, Joseph, <i>vs.</i> Frederick Shipley, Lewis D. Beall, and S. A. Leckey,	-	-	48
Dolan, James, and Peter Foy, <i>vs.</i> The Mayor and City Council of Baltimore,	-	-	394
Doub, John, <i>vs.</i> Abraham Barnes, et ux., J. T. Mason, et ux., Lynch and Craft, et al.,	-	-	1
Doyle, Michael, and Benjamin A Buck,	-	-	478
Duncan, J. M., et al., <i>ats.</i> of David T. McKim and Wm. H. Marriott, exc'r of John McKim, Jun'r,	-	-	72
Ely, Hugh, et al., <i>ats.</i> of Ephraim Hamilton,	-	-	34
Erb, Jacob, and others, and Jacob Smith and others,	-	-	437
Ferrall, Dennis W., <i>vs.</i> Alice L. Kent,	-	-	209
Franklin, Elkanah F., Joseph and Sarah Franklin, and William H. Brawner and wife,	-	-	463
Frey, Ira, and Lucius W. Stockton,	-	-	406
Geiger, Christopher, and Joseph and Edward Patterson, et al., <i>vs.</i> Richard Green,	-	-	472
Glenn, John, P. T. of Anne Watson, <i>ats.</i> of John Schwenniski, et al.,	-	-	23
Graham, William, and William S. Pawson, and Wm. E. Mayhew, et al.,	-	-	339
Green, Richard, and Christopher Geiger, and Joseph and Edward Patterson, et al.,	-	-	472
Griffith, Israel, <i>vs.</i> Philip Turner,	-	-	111
Hagerstown Bank and John Schleigh, and Jonathan Kershner,	-	-	306
Hamilton, Ephraim, et al., <i>vs.</i> Hugh Ely, et al.,	-	-	34
Hanson, John Josias, <i>vs.</i> Sam. P. M. Hanson and others,	-	-	69
Hanson, Samuel P. M., and others, <i>ats.</i> of John Josias Hanson,	-	-	69
Harden, William, <i>vs.</i> George Campbell,	-	-	29
Hatton, Henry D., and George Kendrick, and Robert W. Hunter,	-	-	115
Hinkley and Woodward, garnishees of Carey, et al., and James McCall, et al.,	-	-	128
Houck, Ezra, and Robert Annan,	-	-	325
Hume, Barbara E., et al., <i>vs.</i> John K. Pumphrey,	-	-	181
Hunter, Robert W., <i>vs.</i> Henry D. Hatton and George Kendrick,	-	-	115
Hupe, David, <i>vs.</i> Michael Seibert, gar. of Abraham Barnes,	-	-	240
Jones, Joseph H., a. d. b. n. of James Hawkins, and adm'r of Susanna Clagett, <i>vs.</i> John C. Jones,	-	-	87
Kent, Alice L., and Dennis Ferrall,	-	-	209

Lefferman, William, and The Mayor and City Council of Baltimore,	-	425
Lloyd, John, adm'r of Thomas Janney, survivor of J. D. Brown, <i>vs.</i>		
Teresa Burgess, adm'x of Thomas Burgess,	-	187
Marshall, E. A., and William E. Burton, C. S. T. Burke and wife,	-	487
Mayhew, William E., et al., <i>vs.</i> William Graham and William S.		
Pawson,	-	339
Mayor and City Council of Baltimore, and James Dolan and Peter Foy,		394
Mayor and City Council of Baltimore <i>vs.</i> William Lefferman,	-	425
McCall, James, et al., <i>vs.</i> Hinkley and Woodward, garnishees of Ca-		
rey, et al.,	-	128
McCullough, George, <i>vs.</i> Annapolis and Elkridge Rail Road Company,		58
McKim, David T., and William H. Marriott, executors of John		
McKim, Jun'r, <i>vs.</i> J. M. Duncan, et al.,	-	72
Middlekauf, David S., <i>vs.</i> Jacob Barrick and others,	-	290
Mudd, Francis E., exc'r of John A. Turton, <i>vs.</i> Thomas G. Turton,	-	233
Owens, Nicholas, et al., and Ellen B. Warfield, et al.,	-	364
Parker, Stafford H., <i>vs.</i> James C. Sedwick,	-	318
Peters, Cæsar, et al., <i>vs.</i> John, Matthew S., and Joseph Van Lear,	-	249
Pike, Henry, and E. V. and G. W. Ward, and Tunis Van Brunt,	-	270
Post, George W., and William Fitzhugh, <i>vs.</i> Christian Sheppard,	-	276
Pumphrey, John K., and Barbara Hume, et al.,	-	181
Ricketts, Lovering, <i>vs.</i> Violet Ricketts,	-	105
Schleigh, John, and Jonathan Kershner, <i>vs.</i> The Hagerstown Bank,	-	306
Schwenniski, John, et al., <i>vs.</i> John Glenn, P. T. of Anne Watson,	-	23
Sedwick, James C., and Stafford H. Parker,	-	318
Seibert, Michael, gar. of Abraham Barnes, and David Hupe,	-	240
Sheppard, Christian, and Geo. W. Post and William Fitzhugh,	-	276
Shipley, Frederick, L. D. Beall, and S. A. Leckey, and Joseph		
Dilley,	-	48
Smith, Jacob, and others, <i>vs.</i> Jacob Erb and others,	-	437
Spickler, N. W., and others, and Joseph Cunningham and others,	-	280
State of Maryland, use of William Miller and David Bell,	-	301
State of Maryland <i>vs.</i> William Sutton,	-	494
State, use of Benjamin G. Harris, adm'r of Lewis J. Ford, and Charles		
Thompson,	-	163
Stockton, Lucius W., <i>vs.</i> Ira Frey,	-	406
Stone, Joseph, et al., <i>ats.</i> Edward R. Wheeler, et al.,	-	38
Sullivan, William, Peter Ritner and Thomas Beers, and John Bevans,		383
Sutton, William, and The State of Maryland,	-	494
Thompson, Charles, <i>vs.</i> The State, use of Benjamin G. Harris, adm'r		
of Lewis J. Ford,	-	163
Thomas, Evan, and Edward Dawes,	-	325
Trundle, Perry L. and Horatio, <i>vs.</i> John M. Williams, adm'r of Over-		
ton Williams, use of John M. Williams,	-	313

Turner, Philip, and Israel Griffith,	-	111
Turton, Thomas G., and Francis E. Mudd, exc'r of John A. Turton,		233
Van Brunt, Tunis, <i>vs.</i> Henry Pike, and E. V. and Geo. W. Ward,	-	270
Van Lear, John, Matthew S., and Joseph, and Cæsar Peters, et al.,	-	249
Warfield, George F., use of Jonathan Manro, <i>vs.</i> Jacob Brewer, of John, and George Keefer, terre-tenants of James Prather,	-	265
Warfield, Ellen B., et al., <i>vs.</i> Nicholas Owens, et al.,	-	364
Wheeler, Edward R., and others, <i>vs.</i> Joseph Stone and others,	-	38
Wilcox, Henry, et al., and Hugh Craft,	-	504
Williams, John M., adm'r of Overton Williams, use of John M. Wil- liams, and Perry L. and Horatio Trundle,	-	313

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
MARYLAND.

JUNE TERM, 1846.

JOHN DOUB *vs.* ABRAHAM BARNES, ET UX., J. T. MASON,
ET UX., LYNCH AND CRAFT, ET AL.

If judgment creditors assent to a deed of trust made by their debtors, assigning real and personal property for their payment, according to their legal priorities; and by their conduct induce third parties to purchase such estate then bound by their judgments, and to believe that they would look to the trustees, and not to their liens, for payment of their claims, such conduct would furnish the purchasers a valid equitable defence, against the enforcement of the judgment liens by a re-sale, under execution.

It would be a fraud on the purchasers, after such conduct, to permit the creditors to enforce their judgments against such purchasers.

In such a case, it would not be necessary for the purchasers to see to the application of the purchase money.

Such a defence, however, could only be available on the ground of fraud; it could not be relied upon as a payment, surrender, or release, nor pleadable as such in a court of law.

Where the character of a defence is not such as that thereby a judgment will be vacated, but equity would prevent its enforcement in relation to certain property of the debtor, it would not constitute a defence at law.

Where the defendant in a judgment assigns property for its payment to trustees, one of whom was the attorney of record of the plaintiff, the fact that the plaintiff had suspended execution on his judgment, while he never acquiesced in the deed of trust, will not prevent to enforcement of his judgment at law against land on which his judgment was a lien, though sold by said trustees.

Doub vs. Barnes, et al.—1846.

The attorney of record in a judgment has no authority to accept a deed of trust for his client.

To a bill by a *bona fide* purchaser, for an injunction, alleging, that certain debtors had conveyed property in trust for the payment of judgments, liens thereon, charging that the judgment creditors were aware of the trust, acquiesced in it, and designed to look to the proceeds of the land sold, and to be sold, under its provisions, for payment; the defendant, an assignee of some of the judgments, answered, that he had no personal knowledge of the complainant's equity, and denied the facts relied on in the bill, upon information which he had obtained. **Held:** that such answer was not sufficient to dissolve the injunction.

Where short copies of judgments upon *sci. fac.*, which recited the names of the original defendants, "*and terre-tenants*," without naming the latter, were filed with an injunction bill, upon a motion to dissolve after answer, the court will infer, that the trustees to whom the original defendants had assigned their land with power to sell, and all their vendees, were returned *terre-tenants*.

It is upon the ground of contribution, that all the *terre-tenants* are required to be made parties to a *scire facias*; and any one tenant, who is made a party, may plead in abatement, that there are other *terre-tenants* who are not made parties. If he fail to do this, he cannot afterwards have contribution.

Where defendants at law assigned their lands to trustees for sale, to pay judgments according to their priorities, and they made sales, a purchaser who had not looked to the application of his purchase money, cannot, as against a judgment creditor who had not consented to the deed of trust, nor in any way acquiesced in it, require such creditor to proceed, *first*, against the land remaining unsold by the trustees, and *next*, against the land sold by the trustees after the sale made to such purchaser, in the reverse order of such sales.

As lands are sold for the payment of judgments under executions in this State, the debtor has not the right to compel the levy and execution of the writ upon all the lands.

A judgment against *terre-tenants*, gives the plaintiff a right to sell as much of the land as may be necessary to satisfy his claim; and if any one of the *terre-tenants* is injured, he would have a right to go into equity to compel all with whom he stood in *equali jure*, to contribute: nor is such plaintiff compelled to suspend his execution, until the question of contribution shall be settled between the various defendants at law.

In the case of *Murphy vs. Cord*, 12 Gill & John., 182, this court decided, that the lien of a judgment was not lost with the right to issue an immediate execution, and the lien remained for twelve years.

Where the debtor alienated lands subject to the lien of a judgment, before the right to issue an immediate execution was suspended, that is, within three years from the date of the judgment, a *scire facias* was unnecessary to affect the *terre-tenants*.

But where a *scire facias* was necessary to revive the judgment, whether by death or lapse of time, it was necessary against all the *terre-tenants* whose lands were to be affected by the judgment.

Doub vs. Barnes, et al.—1846.

APPEAL from the Court of Chancery.

The bill in this cause, was filed on the 17th January 1846, by *John Doub*, of *Washington* county; and alleged, that *Abraham Barnes* being indebted to divers persons, and many judgments having been recovered in the county court of said county against him, as principal debtor, and *Melchoir B. Mason* and *John Thompson Mason*, as his sureties; the said *A. B.* and *Margaret S. C.*, his wife, and the said *M. B. M.* and *J. T. M.*, by deed, dated on or about the 11th October 1839, conveyed unto *David G. Yost*, since deceased, and *William Price*, certain lands lying in *Washington* county aforesaid, parcels thereof belonging to the said *A. B.*, and other parcels unto *M. B. M.*, and other parcels unto the said *J. T. M.*, in trust, among other things, to sell and dispose of said lands, and the proceeds thereof to apply to the payment of the creditors of the said *Abraham Barnes*, by judgment and otherwise, according to their just priorities; and by said deed, the said *Barnes* likewise conveyed to said trustees a very large and valuable personal estate, for the purpose aforesaid; that said trustees entered upon the execution of the trusts created and confided to them by the aforesaid deed, and at several times have sold parcels of said real estate to divers persons; that is to say to *George Cromer*, *Francis Dodge*, &c., &c., and to *John Hanson Thomas* and your orator, and he files herewith a statement of the names of said purchasers, and dates and other particulars of said purchases; and that he believes said trustees have sold and disposed of all the personal estate conveyed to them, as aforesaid, and that they have collected the proceeds of sales of the personal estate sold by them, as aforesaid, and also of all the parcels of real estate sold as aforesaid, (excepting of the parcels sold, as aforesaid, by them unto the said *J. H. T.*;) that at this moment he is not informed of any failure of duty on the part of said trustees, excepting as aforesaid, and as at present advised, and believes, the said trustees have discharged their duty in every particular: unless it may be that they have erred and violated their duty, in omitting to require payment from the said *J. H. T.*, of the purchase

Doub vs. Barnes, et al.—1846.

money for the parcels of land, as aforesaid, sold to him. And your orator further charges, that he has paid said trustees the full amount of the purchase money, for the parcels of land so as aforesaid purchased by him, and which he charges were sold for their full value; and he verily believes and charges, that said purchase money has been properly applied by the said trustees, in execution of the trusts of the aforesaid deed, and of their duty as trustees, as aforesaid, and he therefore well hoped that he had acquired, by the conveyance of the said trustees to him, of the land purchased by him as aforesaid, a perfect and unquestionable title, as against all the creditors of the aforesaid grantors and every of them; but now, so it is, certain persons, that is to say, *Edmund Lynch* and *Jacob Craft*, having recovered judgments against the aforesaid grantors, prior to the execution of said deed of trust, have recently caused said judgments to be revived, have issued writs of *fieri facias* thereon, and have caused the same to be laid on the parcels of land, as aforesaid, purchased by your orator, with the purpose, as your orator is informed and believes, of coercing him to payment of said judgments; and that the said *J. T. M.* hath also purchased up, (for sums far below their par value,) certain other judgments, which had been recovered by other persons against said grantors, prior to the execution of said deed of trust, and hath caused the same to be revived, and to be entered for the use of his wife, *Margaret A. Mason*; and executions to be thereon issued and laid on the land, as aforesaid, purchased by your orator, and for the purpose of coercing your orator to pay said judgments; all of which proceedings, independent of the actual motives operating on said parties, are, because of the unequal and unjust operation thereof on your orator, fraudulent in the estimation of this court, and your orator herewith files short copies of the judgments on which executions have issued, as aforesaid, &c.; and your orator charges, that the creditors issuing executions, as aforesaid, had notice of said deed of trust shortly after the making thereof, and acquiesced in the assumption by the trustees of control over said property, that they suspended all proceedings on their aforesaid judgments, and by other acts, indicative of their intention to

Doub vs. Barnes, *es al.*—1846.

look for payment of their claims to the proceeds of sales which should be made by the trustees, gave credit to said trustees, and enabled said trustees to make sales more eligible to the creditors than could otherwise have been effected; and your orator expressly charges, that he was persuaded to purchase as aforesaid, and to make payments of the purchase money to said trustees, from his belief, (which he avers was well founded by the conduct of said creditors,) that the creditors would look to said trustees, and only to said trustees, for payment of their said claims out of the proceeds of sales to be made, as aforesaid; is therefore advised, that even assuming that he would otherwise have been compelled to see to the due application of the purchase money aforesaid, which he does not admit, yet, that under all the circumstances aforesaid, the said creditors ought to be confined to their remedy over against said trustees, for any misapplication of the proceeds of sales received by them; and as to the judgments, so as aforesaid purchased by the said *J. T. M.*, your orator is further advised, that if said judgments were purchased with the proper moneys of the said *Margaret A. Mason*, and are now properly assigned to her separate use, she would be chargeable with the notice which the said *J. T. M.* had at the time of such purchases. But he is further advised that, in the absence of proofs to the contrary, it ought to be assumed, that the said purchases were made with the proper moneys of the said *J. T. M.*; and further, that upon the entries as they now stand, the said judgments have vested beneficially in said *J. T. M.*, by virtue of his marital rights; and further to show the acquiescence and consent of said creditors to said trust, your orator charges, that at and for some time after the date of said deed of trust, the said *David G. Yost* was the attorney of record of the said *Henry Tiffany*, &c., and the said *William Price* was the attorney of record for the said *William McKim*, *John Trimble*, and *Lynch & Craft*. And your orator further charges, that if he is at all responsible for the due application of the moneys received by the trustees, as aforesaid, he is at the least, entitled to a discovery from the trustees, of the manner in which the moneys received by them have been appropriated; and to have any fund yet

Doub vs. Barnes, et al.—1846.

remaining in their hands yet applied to his exoneration, and to the benefit of the incumbrances discharged by them for protection of his title ; and that in the meantime, and until the extent of your orator's just liability can be determined, the creditors aforesaid, ought to be restrained from proceedings against him, upon their executions aforesaid; your orator hereby offering to pay to said creditors such sums as, upon taking an account of said trust, shall be adjudged to be payable by him to them; and that this indulgence ought to be granted to him, the rather, since very many questions of priority must arise between the creditors of the said parties, if they are permitted to proceed on their incumbrances at law, which said questions cannot be determined in the country, and which, whilst they remain open, tend greatly to depreciate the value of your orator's land, and would, very probably, lead to its sale at a fearful under-value. And your orator is further advised and charges, that the said trustees have yet on hand and undisposed of, about four hundred acres of said land, which are reasonably worth about fourteen thousand dollars; and that said creditors, if permitted at all to proceed with their said executions, ought to be required in the first instance, to exhaust their remedies against said unsold land, and if this should be insufficient to discharge the said executions, then the said creditors ought to proceed against the purchasers from said trustees, in the reverse order of their respective purchases; so that your orator ought not to be called on to contribute, until all the lands sold by said trustees, after the sales made unto your orator, as aforesaid, have been applied to the payment of said judgments; and your orator charges, that the said *John Hanson Thomas* made his purchases aforesaid, long after your orator had purchased; that, in fact, no part of the purchase money agreed to be paid by said *Thomas*, has been paid by him to said trustees: the said money being permitted to remain in his hands, under an impression entertained by said *Thomas* and the said trustees, that the trust fund, exclusive of the purchases made by said *Thomas*, would be sufficient to discharge all the judgments of older lien than a judgment which he had recovered against the said parties, and that consequently, that the money in the hands of

Doub vs. Barnes, et al.—1846.

said *Thomas*, would be properly applicable to the payment of the incumbrances held by him; but in fact, this impression is so far groundless in the result, that the judgments on which executions have been issued as aforesaid, are prior in date and lien to the judgment claim of the said *Thomas*: hence there is, as your orator is advised, peculiar equity in requiring the said *Thomas* to pay in the amount of his purchases, as aforesaid, for the benefit of the aforesaid judgment creditors, before your orator is called on to pay a second time for the land which he purchased, and has already paid for. And your orator charges, that said *David G. Yost* has lately died intestate, and utterly insolvent, and that no administration has been taken out on his estate. The bill then prayed for a discovery by *Mason and wife* in relation to her separate estate; for an account by the trustees; that the complainant's title, as purchaser, might be protected; sale of the land, if necessary, in the reverse order of the purchases made from the trustees; for injunction against the judgment creditors; general relief and subpœna, &c.

With this bill was filed :—

The deed of trust of 11th October 1839, between *A. Barnes and wife, M. B. Mason and John T. Mason* of the one part, and *William Price and D. G. Yost* of the other part; reciting, that whereas *Abraham Barnes* is indebted in various sums of money, and is desirous to make adequate provision for the early payment of the same in full, in which the said *M. B. and J. T. M.* united, then conveyed a variety of real and personal estate, in trust, to sell the same; reserving to the grantors the right of user and occupation, &c., until a sale be made; and after payment of expenses and trustees commissions, to apply the proceeds of said real estate “to the payment of all the debts of the said grantors, without any priority or preference, except as the same may exist by law; and to apply the proceeds of the personal estate in like manner; trustees not to be liable for deterioration, or misconduct of each other.”

There were also filed, statements of sales of land, and a great number of short copies of judgments against the grantors, in the deed of trust. Some of the judgments were entered for the use of *Margaret A. Mason*.

Doub vs. Barnes, et al.—1846.

The answer of *Margaret A. Mason*, wife of *John Thompson Mason*, alleged, that she knew nothing of the matters and things contained in complainant's bill; of the deed of trust executed by *A. Barnes and others*, of the contents and provisions of said deed, nor of its execution; that before this defendant was married to the said *John Thompson Mason*, she united in a deed of settlement, appointing a certain *William Ebbs* her trustee, subsequently: to wit., in the month of July 1844, this defendant petitioned for the appointment of her said husband as trustee, in the place of the said *William Ebbs*, and, as she is informed, he was accordingly appointed. How the said *John Thompson Mason* has invested her property and funds, since his appointment as trustee, as aforesaid, this defendant is wholly ignorant and uninformed; she prays that this honorable court may protect her rights, and pass such decree in the premises as will tend to that end.

The answer of *Edward Lynch* and *Jacob Craft*, admitted, that judgments were recovered in *Washington* county court against *A. B. M.*, *B. M.* and *J. T. M.*; that said *A. B.* and his wife, *M. B. M.*, and *J. T. M.*, did, at or about the time stated in said bill of complaint, execute the deed of trust as is stated in said bill; but these respondents deny that they ever saw or assented to said deed of trust, or in any way expressly or impliedly consented or agreed, in any manner, to waive their liens which were secured to them by their said judgments; that they believe that said *Yost* and *Price* entered upon the performance of the trust of said deed, and have also sold large parcels of the estates so conveyed to them, but how much they have thus sold, or to whom sold, they are utterly ignorant, and therefore cannot admit or deny; that they know nothing about what sales of personal property said trustees have made, nor what money they have received, nor how they have disbursed the same; and these respondents do not know, and cannot therefore admit, that said *Doub* has paid to said trustees, the amount for which said trustees sold to said *Doub* the land, he, said *Doub*, purchased of them; but they aver and insist, that their judgments are and were liens upon the land the said *Doub* did so purchase, and that it was the

Doub vs. Barnes, et al.—1846.

duty of said *Doub* to have seen the liens upon said land released, before he paid the said purchase money to said trustees, and an omission so to do was neglect on his part, for which these respondents ought in nowise to suffer ; that they have recovered judgments against said *A. B.*, *J. T. M.* and *M. B. M.*, prior to the execution of said deed of trust, and have also caused said judgments to be revived by *scire facias*, against said *Doub*, as one of the terre-tenants of said defendants, and have issued executions upon such revived judgments, in order to procure the payment of their said debts. But these respondents being utterly ignorant of any of these acts of *J. T. M.*, in reference to purchasing up judgments, as alleged in said bill, cannot either admit or deny the allegations in said bill, in reference thereto ; they deny that they ever acquiesced in, or assented to, the assumption of the trust by said *Yost* and *Price*, or that they ever did any act, or intended to do any act, by which they agreed or indicated an intention to agree, to look for the payment of their claims to the proceeds of sales which should be made by said trustees ; they further deny that said *Doub* was personally persuaded or induced to purchase said property, and to make payments therefor to said trustees, from a belief, either well or ill founded, from the conduct of these defendants, that they, these defendants, intended to look to said trustees, and only to said trustees for payment of their said claims out of the proceeds of sales to be made by said trustees ; and they further deny that any act of these defendants ever warranted or justified such an inference by said *Doub* ; they admit that said *William Price* was their attorney of record in the recovery of their said judgments as aforesaid, but are ignorant of said trustees having any part of the land conveyed to them, on hand, or what is its value ; and they also are ignorant of whom *John Hanson Thomas* bought, or for what he purchased, and whether he paid any part of the whole of his purchase, nor under what impressions his purchase money was allowed by said trustees to remain in his hands, nor what are said *Thomas*' liabilities :—Your respondents insisting, that they can have nothing to do with the controversies between said *Doub* and said *Thomas*, and should not be delayed in

Doub vs. Barnes, et al.—1846.

the payments of their judgment claims, recovered against said *Doub* as terre-tenant, because he and said *Thomas*, or some one else, has or may have an account to settle between them and said trustees.

The answer of *John T. Mason* alleged, that out of the separate estate of his wife, he purchased, as her trustee, several of the judgments revived by *scire facias*, which were entered for her use; and showed, how that separate estate had been created by ante-nuptial contract. So far, however, as his answer was responsive to the equities alleged in the bill, his denials thereof were founded on information and hearsay of others. The opinions of this court, and of the dissenting judge thereof, sufficiently state his answer.

At March term 1846, the defendants, *J. T. Mason and wife*, and *Lynch & Craft*, moved for a dissolution of the injunction which had been granted upon the prayer of the bill, which the chancellor, (BLAND,) on the 11th March 1846, dissolved. The complainant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MAGRUDER, J.

By ALEXANDER for the appellants, who cited :—2 *G. & J.*, 215. 1 *Bland* 199. 1 *Fonbl. Eq.*, book 1, ch. 3, sec. 4. 7 *Simons*, 1. 1 *Johns. Ch. Rep.*, 344. 10 *Engl. Ch. Rep.*, 340. 4 *Munf.*, 351. 3 *Sugd. Vendors*, 317, (453.) 5 *Peters*, 99. 3 *Co.*, 11 v. 5 *Johns. Ch. Rep.*, 235. 9 *Cowen*, 403. 1 *Johns. Ch. Rep.*, 447. 1 *Ves.*, 258. 10 *Engl. Ch. Rep.*, 488. 10 *S. & R.*, 450. 2 *Fonbl. Eq.*, book 2, ch. 6, sec. 2. 10 *G. & J.*, 295.

By J. T. MASON and McMAHON, who cited :—2 *Wm. Saund.*, 72, n. 4. 1 *Blackf. Ind., Rep.*, 401. 1 *John. Cases*, 492, 502. 12 *G. & J.*, 318. 10 *G. & J.*, 363. 1 *Pick.*, 347. 5 *Peters*, 113. 14 *Ser. & Raw*, 307. 1 *Dessau*, 309. 1 *Hill* 184. 5 *Stewart and Porter*, 34. 8 *John.*, 361. 10 *John.*, 220. 3 *J. J. Marshall*, 532. 11 *John.*, 464. 4 *Dessau*, 45. 5 *Vermont.* 1 *Porter Alab.*, 212. 1 *Call.*, 498.

Doub vs. Barnes, et al.—1846.

4 *Munf.*, 351. 9 *Con. E. Chan.*, 449. 4 *John.* 353.
 1 *Bland*, 137. *Sto. on Eq. Pl.*, 149. 1 *Blackf.*, 404.
 1 *Watts Pen. R.*, 424. 5 *Watts*, 320. *Purdon's Digest*,
 198. 1 *Har. and John.*, 471. 2 *Har. and John.*, 74.
 3 *G. & J.*, 365. 12 *G. & J.*, 182. 9 *Wheat.*, 501.
 3 *Bland*, 298. 19 *John.*, 493. 1 *Paige*, 185. 2 *Leigh*, 443.

When the case of *Murphy vs. Cord*, 12 *G. & J.*, 182, was cited in the argument, JUDGE CHAMBERS said :—

It was the decision of this court, and if an opinion had been filed in that case, would have been expressed—

1. That the lien of the judgment was not lost with the right to issue an immediate execution, as had been announced by the chancellor in 3 *Bland*, 298, and the lien remained for twelve years.

2. That when the debtor alienated lands subject to the lien of a judgment, before the right to issue an immediate execution was suspended, that is, within three years from the date of the judgment, a *scire facias* was unnecessary to affect the terre-tenants.

3. But where a *scire facias* was necessary to revive the judgment, whether by death or lapse of time, it was necessary against all the terre-tenants whose lands were to be affected by the judgment.

This was assented to by all the judges present.

MAGRUDER, J., delivered his opinion, as follows :

It is my opinion, that the order of the Chancellor dissolving the injunction in this case, ought to be affirmed, and that *Mrs. Mason*, (as well as the defendants, *Lynch* and *Craft*,) ought to be at liberty to issue executions on the judgments assigned to her. Some of the grounds of that opinion I will proceed to state.

In the course of the argument it was conceded, and indeed could not be denied, that the defendant, *Mrs. Mason*, was the *bona fide* owner of the judgments entered for her use, having paid for them a valuable consideration, and without knowledge of the now supposed equity of the complainant. It is more-

Doub vs. Barnes, *et al.*—1846.

over not to be questioned, that not one cent of these judgments has been satisfied. It is also unquestionable, that if the complainant has any equity, the whole of it existed long before the judgments at law were *revived*.

Upon what then can the complainant ground his claim to relief in equity?

It appears that after the original judgments were rendered, the defendants at law executed a deed of trust, conveying to the trustees, with other property, the land afterwards purchased by the complainant. The creditors were not parties to that deed, and did not assent to its execution. But it is alleged, that "the complainant was induced to purchase as aforesaid, and to make payment of the purchase money to the said trustees, from his *belief*, (which he avers to be well founded *by the conduct of the creditors*,) that the creditors would look to said trustees for payment of their claims out of the proceeds of sales to be made, as aforesaid." It is also alleged, that the creditors "acquiesced in the assumption by the trustees, of control of said property, and by other acts," (nowhere specified,) "indicative of their intention, to look for payment of their claims to the proceeds of sale, which should be made by the trustees, gave credit to the said trustees, and enabled them to make sales more eligible to the creditors than could otherwise be effected." Now, with respect to those other acts, unless they were mentioned, of course they cannot be denied, and for obvious reasons allegations of this description can furnish no ground for an injunction. This, it is believed, is the whole equity of the complainant's case. There is something, indeed, said about the creditors having notice of the deed after its execution, but this furnishes the complainant with no title to relief. The defendants at law had a right to sell the land, and could authorise any person to sell it for them. To this the creditors, if apprized of the deed, or of the intention to execute it, could not object. It was the business of the purchaser to look to the provisions of that deed, and to ascertain what liens there were upon this land before he paid the purchase money, and to see to the application of the purchase money. No expression to be found in the deed of trust could mislead the complainant.

Doub vs. Barnes, et al.—1846.

The creditors never expressly agreed to surrender their remedy at law, and look to the trustees for the amount of their claim. This the complainant chose to infer from the conduct of the creditors,—and what was that conduct? He speaks indeed of “other acts,” which he supposed would warrant his belief, but such expressions are to be disregarded, and the only circumstance mentioned in the bill is, that the judgment creditors “suspended all proceedings on their judgments,” and this it seems led the complainant to believe, that they had in fact agreed to release their judgments, *as judgments*, and only to regard them as evidence of the amount of their claims, to be collected without having recourse to execution.

It surely cannot be in the power of the court of chancery to grant the relief which is sought in this case, when the claim to relief is founded on such a circumstance. A creditor may, if he thinks proper, forbear to execute his debtor as long as the law authorises him, without giving to third persons a right to infer that the claim is paid, or its payment is not to be enforced by execution. It is the purchaser’s fault that he trusted the trustees, and did not enquire of the creditors whether they were disposed to trust them.

Dates, however, furnish an answer to all this. The judgments were obtained in October 1839, and much of the land was sold to the complainant early in the year 1840. Surely the creditors here were guilty of no *laches*, from which any individual had a right to infer, or “believe,” that they designed to waive any remedy which the law afforded them.

The judgment creditors were not bound to take notice of the deed of trust, but the purchaser was. He claims under it, and the deed told him that the several judgments here in controversy, were each of them a lien on the land. It was then the obvious duty of the purchaser to enquire of these judgment creditors whether, if he purchased the land and paid the purchase money to the trustees, their deed would give him a valid title. Failing to do this, he cannot now ask that the judgment creditors should be deprived of the lien which their judgments gave them upon the land, and which it is nowhere asserted they afterwards agreed to release. The maxim: *Vigilantibus*

Doub vs. Barnes, et al.—1846.

non dormientibus leges subserviunt, is applicable to debtors and purchasers, as well as to creditors. To afford relief to the complainant in this case, even if there was no other ground on which it ought to be refused, would be to allow him to take advantage of his own *laches*, when none can be imputed to the creditors.

There are other grounds for dissolving this injunction, some of which will be noticed.

The execution of the judgment obtained by *Lynch* and *Craft* is no longer to be stayed, and this, because in their answer to the bill, they deny that they ever saw or assented to the deed, or agreed to waive their lien on the land. The answer of *Mrs. Mason*, (which alone is to be considered here,) cannot in positive terms deny this knowledge and assent by the original creditors, (the persons who assigned the judgments to her,) and simply for this reason, the injunction, though it no longer is to restrain *Lynch* and *Craft* from suing out their executions, is to prevent all proceedings at law upon the judgments which have been assigned to *Mrs. Mason*.

Now, without stopping to enquire whether this equity, denied in the answer of *L.* and *C.*, is any where explicitly charged in the bill, it really does strike me, that there is very much less of equity in the case so far as *Mrs. Mason* is concerned in it, than is to be found in it, so far as it is a case between the complainant and *Lynch* and *Craft*, and depending upon their answer. All my reflection upon the subject brings me to the conclusion, that even admitting there were matters charged in the bill, which possibly might entitle the complainant to relief against *Lynch* and *Craft*, still, there can be found in them no ground whatever for interposing any delay, to the execution of the judgments which had become the property of *Mrs. Mason*.

We are often told, that the assignee of a bond or judgment, takes it subject to all equities which exist against the assignor. This, as a general rule, is correct; but then, circumstances may place the assignee in a better situation than the assignor would have been in, if he had remained the owner of the judgment. Of this we have happy illustrations in the case of *Kemp's executrix against McPherson*, 7 H. & J., 320, and

Doub vs. Barnes, et al.—1846.

in some of the cases there referred to; and also in the case before us. If in this case, the complainant could obtain relief, then he would be permitted to practice a deceit upon *Mrs. Mason*.

The complainant purchased most of the land in 1840, and yet took no steps in regard to the judgments, either to have the purchase money applied to their satisfaction, or to obtain from the then owner of the judgments, an acknowledgment that they were no longer a lien on the land.

In 1844, *sci. fas.* were issued to revive those judgments, and issued against him as terre-tenant of this land. Of course he was called upon to show cause, not simply why the judgments should not be revived, but also why *fi. fas.* issued upon those judgments should not be levied upon this land. Assuming then, that of any part of his supposed defence in equity he could not avail himself at law, yet it must be admitted, that whatever defence he now has in equity, has been equally so ever since the complainant paid the purchase money. To conceal that supposed equity, was to practice a fraud upon any person who might have become, or at any time afterwards became, a *bona fide* purchaser of the original judgment. It was his duty to make known that equity, in order to prevent others from being sufferers by the concealment of it. A *sci. fa.* was issued, and yet nothing was said of this *latent* equity. Instead of disputing the case any where, he consented to give a judgment against him, and thereby acknowledged upon the record that the whole debt is due, and that this land is answerable for the amount of it, and will be liable to be sold therefor, if the money be not paid before the expiration of the time, during which, by agreement, the execution is to be stayed. Surely this was declaring to *Mrs. Mason*, and all others who might be disposed to purchase these judgments, that if they had any doubts before, they might dismiss them; that the claim was undoubtedly good, at all events, so far as the land, when sold, would pay it; and he had agreed upon the record, that the land should be sold for the purpose, if the debt was not paid before the expiration of the eight months:—and is this a case in which the appellee is entitled to relief against the subsequent assignee of the judgment? Impossible.

Doub vs. Barnes, et al.—1846.

If the complainant had any equity whatever, the whole of that equity existed when *Mrs. Mason* acquired an interest in these judgments, and had existed several years previously thereto; and the defendant was bound to know, that any person had a right to purchase those judgments. The charge in fact is, that the original plaintiff sold to *Mrs. Mason*, as judgments in full force, judgments which, by his own acts or omissions, had ceased to be of any value *as judgments*. If this was so, then the complainant, in forbearing to set up his defence, either at law or in equity, in omitting to file his bill, at all events, so soon as the *sci. fas.* were issued, is himself to be regarded as guilty of the fraud which his neglect enabled, and was calculated to enable, the plaintiff at law to practise upon others. Moreover if this be so, then unquestionably the plaintiff at law is bound to refund to *Mrs. Mason* the money which she paid for the judgments. Surely, then, the decree of the court, which gives to this complainant the relief which he now asks, if it did not also give to *Mrs. Mason* relief against the assignors, ought to be evidence against him, in any proceeding which *Mrs. Mason* might be forced to institute against them, in order to recover back the money thus obtained from her *by false pretences*. But the decree in this case would be no evidence against the assignors, because they are no parties to the suit. They would then be at liberty to dispute her claim, founded upon the decree, and might insist, that if they had been parties to the suit, they would have filed answers, like that of *Lynch* and *Craft*, and thereby have secured to *Mrs. Mason* her money.

It was then a conclusive objection to the granting or continuing of this injunction, (so far as it restrained all legal proceedings upon *Mrs. Mason's* judgments,) that her assignors were not made parties to this suit, and that the complainant, by omitting to make them parties, deprived *Mrs. M.* of the answers, which, if given, we have a right to assume would have contained as explicit a denial of the charges, as are to be found in the answers of *L.* and *C.*

It is true, that when objections of this kind arise, we are often reminded, that in some of the books of equity practice,

we are told of cases in which though the assignor may be, yet he need not be, made a party. It will be difficult to find a book of equity practice of any reputation, which gives the slightest ground for the notion, that in any case like this, the assignor is not an indispensable party to the suit. I forbear to notice what the books of practice, to which we are referred, say upon the subject, because no foreign treatise of equity practice lately published, could influence my opinion on this question : and I choose here to say, why I thus express myself.

It is the practice to cite as authorities in the courts of *Maryland* every new book, the author of which has any reputation at home, and every decision of any court, with a report of which we are furnished. This is a sore grievance, and ought to be corrected. At the period of the revolution our courts had adopted for the administration of justice by them, rules, (some of them borrowed, and some not borrowed, from the courts of *England*;) deemed to be “applicable to our local and other circumstances ;” and ever since the revolution, our General Assembly has claimed and exercised the right to regulate the practice, and enlarge or abridge the jurisdiction of the chancery court. Our chancery practice then, rightfully consists of what it was at the time of the revolution, and what it has since been made by our own legislation. To understand what it really is, its own decisions are authority, and these will show, that we have some equity, as we have some common law, for which we are not indebted, either to our own statute book, or to any description of law existing in England, at the time when we ought to have ceased to borrow law from her courts, or her legislature.

It is to an occasional forgetfulness of this, that we have decisions which can never be reconciled, and our system of equity, as settled by our forefathers, has been altered by decisions elsewhere, which, whatever be their merit elsewhere, ought not to be received *as authority* in the courts of Maryland.

It is as well settled in this State, and perhaps has been settled as long, and in the same way, that the assignor of a bond or judgment is an indispensable party to a suit in equity, to annul or to enforce it, as that the courts of common law may,

Doub vs. Barnes, et al.—1846.

at the appearance term, grant to the defendant a writ of *retorno habendo*, in an action of replevin. Cases which make an assignor an indispensable party, and in which, for the want of such parties, decrees have been reversed, and the bill dismissed, it has not been thought necessary to report, if nothing else was decided in them. The legislature may make the law otherwise; the courts must not.

I deem it to be unnecessary to dwell upon another ground on which relief is sought, to wit: that there are other lands also liable, and other terre-tenants, who ought to have been made parties to the proceeding at law by *sci. fa.* This was unquestionably a good defence at law, but furnishes none in equity. It is a defence which the complainant chose to abandon, with other defences, when he entered a *fiat*, and in consideration of it obtained a stay for eight months.

I have all along spoken of *Mrs. M.*, as a *bona fide* purchaser for valuable consideration, of the judgments. Something which would seem to mean otherwise, is to be found in the bill of complaint; but besides being disproved by the answer, it was abandoned in the argument.

I cannot agree with the court, that *Mrs. Mason* ought not to have execution of her judgments.

ARCHER, C. J., delivered the opinion of this court.

The equity of the bill consists in the facts alleged, that after the rendition of the judgments against *Abraham Barnes, M. Mason* and *J. T. Mason*, a conveyance was executed by them for all their real estate in *Washington* county, and a large personal estate, to trustees, in trust, to pay their debts according to their legal priority; that such deed was made to *Messrs. Yost and Price*, who were attorneys of the judgment creditors, on the 11th of October 1839; that said deed of trust was made known to the judgment creditors shortly after its execution; that they acquiesced in the assumption by the trustees of control over the property conveyed; that they suspended all proceedings on their judgments; that by acts, indicative of their intention to look for payment of their claims to the proceeds of sales which should be made by the trustees, they gave credit

Doub vs. Barnes, et al.—1846.

to the trustees, and enabled the trustees to make more eligible sales for the creditors than could otherwise be effected; that the complainant was persuaded to purchase and make payments, from a belief well founded in the conduct of the creditors, that they would look to the trustees, and only to the trustees, for payment of their claims out of the proceeds of sale to be made by them.

If the judgment creditors assented to the deed of trust, and by their conduct induced the complainant and others to become the purchaser of the lands bound by their judgments, and to believe that they would look to the trustees for the payment of their claims, and not to the liens created by their judgments, we cannot but believe that such conduct would furnish a valid equitable defence. To allow the judgment creditors, after such a course of conduct, to enforce their judgments against the purchasers, would be to permit them to perpetrate a fraud upon the purchasers. The obvious consequence of such a procedure on the part of the judgment creditors, would be to lull the purchasers into a false security, and to induce them to believe that a title would follow the payment of the purchase money. Upon the state of facts alleged, it would not be necessary for the purchasers to see to the application of the purchase money, credit being given to the trustees, and they being known to be alone looked to for the payment of the judgments by the proceeds of sale.

Such a defence could, however, be only available on the ground of fraud; it could not be relied upon as a payment, a surrender or release, and pleadable as such in a court of law. It is true, fraud is as well cognizable in a court of law as a court of equity; and it is contended, that if this be a defence, it should have been made available at law. The character of the defence is not such as that thereby, the judgments are vacated, but equity would prevent their enforcement, on the ground that to allow the judgment creditor, under the circumstances, to enforce the lien of their judgments, would be to enable them to perpetrate injustice on the purchasers.

The answer of the defendants, *Lynch* and *Craft*, explicitly denies all the equity as above referred to in the bill. They

Doub vs. Barnes, et al.—1846.

deny that they ever assented to the deed of trust, or in any way expressly or impliedly consented or agreed in any manner to waive their liens, which were secured to them by their judgments; and again, they deny that they ever acquiesced or assented to the assumption of the trust by *Yost* and *Price*, or that they ever did any act, or intended to do any act by which they agreed or indicated an intention to look for the payment of their claims to the proceeds of sales, which should be made by the said trustees. They further deny that the complainant was persuaded or induced to purchase said property, and to make payments therefor to said trustees, from a belief, either well or ill founded from their conduct, that they intended to look to said trustees, and only to said trustees, for payment of their claims out of the proceeds of sale to be made by said trustees.

There would exist therefore, only two facts upon which the equity of the complainant is founded, which are not explicitly denied by the answer of *Lynch* and *Craft*: but the existence of these facts cannot affect the question under consideration. The facts referred to are, that *Mr. Price* was the attorney of *Lynch* and *Craft*, and that *Lynch* and *Craft* had suspended execution on their judgments. As attorney, *Mr. Price* had no authority to accept for his client the deed of trust in the record, and the suspension of proceedings on the judgment could work no injury to *Lynch* and *Craft*, if it be true that they always looked to their judgments, and not to the deed of trust, for satisfaction.

The answer of *Mr. Mason* is subject to different considerations. He stands in the character of assignee of several of the judgments, and in his answer professes to have no personal knowledge of the averments, above adverted to, as constituting the equity of the complaint, and he denies the facts relied upon, only upon the information which he had obtained. We cannot, on this account, give to the answer the effect of dissolving the injunction. No case has been cited which would sanction such a result. The complainant is entitled to his equity, unless it shall be removed by positive averments in the answer, and not hearsay.

Doub vs. Barnes, et al.—1846.

It is contended on the part of the appellant, that independent of any question of assent or acquiescence on the part of the creditors, the appellant is entitled on general principles of equity to insist, that the creditors shall proceed first, against the land yet remaining unsold and liable to execution, and next against the lands sold by the trustees, after the sales made to him in the reverse order of those sales, and that the lands so purchased by him shall not be made to contribute to the payment of said judgments, until after the funds before mentioned shall have been applied to that purpose.

The judgments having become dormant, were revived by *sci. fa.* against the original defendants and the terre-tenants. The proceedings before us do not show who were made terre-tenants; but as the judgments, filed as exhibits, show that these judgments were revived against the terre-tenants, we infer that all the vendees of the land, as well as the trustees, were returned terre-tenants.

The effect of such a judgment in *England*, where lands are extended and not sold, would be to give to any party defendant the right to coerce the plaintiff to take out execution against the lands of all the terre-tenants, by which means he would have the benefit of contribution, and if he took out execution against only one terre-tenant, relief would be granted by an *audita querela*. It is upon the ground of contribution that all the terre-tenants are required to be made parties, and any one tenant who is made a party, may plead in abatement, that there are other terre-tenants not made parties. If he fail to do this, he cannot afterwards have contribution.

The contribution thus secured by extending all the lands of the terre-tenants upon which the judgments were liens, operated upon each according to the value of the property of which he was tenant, so that the contribution was equal, and had no reference to the dates of the conveyances from the judgment debtor, by which they had become terre-tenants. 1 *Leigh*., 144. Departures from this doctrine appear to have taken place in *New York*. We do not believe that they are consistent with the established law in the *English* courts. The most, therefore, that the complainant could claim, would be contribu-

Doub vs. Barnes, et al.—1846.

tion from the vendees of the land, in proportion to the value of the land conveyed to each respectively.

As lands are sold for the payment of judgments under executions in this State, instead of being extended, the debtor has not, as in *England*, the right to compel the levy and execution of the writ upon all the lands. The seizure and sale of all would be unnecessary and oppressive, because not necessary in many cases to satisfy the plaintiff's judgment. The judgment against the terre-tenants gives the plaintiff a right to sell as much of the land as may be necessary to satisfy his claim, and if any one of the terre-tenants is injured, he would have a right to go into equity to compel all with whom he stood in *equality*, to contribute.

We do not think that the plaintiff who has obtained a judgment at law, should be compelled to suspend his execution, until the question of contribution shall be settled as between the various defendants in the judgment. This principle appears to have been held by this court in the case of *McCormick and Gibson*, 10 *Gill & John.*, 65.

If there be lands not sold by the trustees, the defendants cannot be driven to resort for satisfaction to such lands. It is obvious that such a proceeding would greatly delay satisfaction of their judgments, involve them in litigation, without a certainty of making such lands to the full extent available as a fund to meet the judgments. Elder judgment creditors might intervene. To compel the respondents to resort to these lands, the court ought clearly to see, that his resort to them would not be attended with difficulty, embarrassment, or delay.

The decree of the chancellor in so far as it dissolves the injunction against *Lynch* and *Craft*, is affirmed, and in so far as it dissolves the injunction against *J. T. Mason*, is reversed.

DECREE AFFIRMED IN PART, AND

REVERSED IN PART.

Schwenniski and wife, *et al.*, vs. Glenn.—1846.

JOHN SCHWENNISKI, ET AL., vs. JOHN GLENN, P. T. OF
ANNE WATSON.—*June* 1846.

W. died intestate, possessed of certain leasehold property, leaving a widow and children. The widow administered on his estate.—Engaging in trade she became indebted; mortgaged said property to an endorser on her own notes, which she paid away for her husband's debts, and immediately applied for relief under the insolvent laws. After this, she proceeded to collect the rents. Upon a bill filed by her permanent trustee, to vacate the mortgage and enjoin her from the collection of the rents, HELD: that as the estate of *W.* had not been distributed, as it appeared some of his debts were yet unpaid, the administratrix still held the property in that character, bound to rent it, and account for the rents as a part of *W.*'s estate.

The permanent trustee might cite the administratrix before the orphans court to settle the estate, and upon its distribution might claim the widow's interest.

Where a bill upon which an injunction had been granted, was removed from the county court to the court of chancery, and the chancellor refused to revise, alter, or reverse the order for the writ, on a motion to dissolve, because he could not interfere with the prior action of the other court, upon appeal, such order was reversed, and the injunction dissolved.

APPEAL from the Court of Chancery.

On the 30th July 1845, the appellee filed a bill on the equity side of *Baltimore* county court, alleging, that a certain *Anne Watson* being largely indebted to various persons, and being altogether and hopelessly insolvent, did, on or about the 11th July 1843, execute unto her son, a certain *Hugh McNeal*, for an ostensible consideration of \$404, a deed of a certain house or store, and lot, on *Pratt* street, &c.; that after the said deed had been put upon record, the said *Anne Watson* did proceed to expend upon the said house, so as aforesaid conveyed by her, repairs exceeding the sum of, &c.; that a short time afterwards, and while the repairs last mentioned were being put upon the house aforesaid, the said *A. W.*, on or about the 22nd August, in the same year, did execute unto her said son, *Hugh McNeal*, a certain other deed or bill of sale, whereby, for an ostensible consideration of \$8750, she did convey unto the said *H. McN.*, all the stock in trade and furniture of her, the said *Anne W.*, of all sorts and descriptions, as will appear by a certified copy of said bill of sale, &c.; that the said *H.*

Schwenniski and wife, *et al.*, vs. Glenn.—1846.

McN., at the time of the conveyance to him as aforesaid, was a young man, deriving from his trade, as an iron worker, but a moderate and mere subsistence, and utterly without pecuniary means; and that the said *H.* could not, and did not, pay, and has not paid to the said *A. W.*, the said sums of money, or either of them, or any part of either of them, as set forth as the consideration of the said deeds, but that the said deeds were, and each of them was made and executed by the said *A. W.*, fraudulently, and with the intent and purpose to delay, hinder and defraud the creditors of the said *A. W.*, of their just and lawful debts and actions, and to disturb, delay, hinder and defraud the said creditors, and to conceal, sell, convey, lessen and dispose of the property and rights of the said *A. W.*, thereby to deceive and defraud her said creditors, and to secure her said property and rights, to receive and expect for herself, the said *A. W.*, profits, benefits and advantages thereby; and your orator further charges, that notwithstanding the said conveyances, said *H. McN.* did permit the said *A. W.* to continue in the house aforesaid, and to occupy the same as a store, precisely as she had occupied it previously to the first conveyance aforesaid, without the payment of any rent whatsoever; and your orator charges moreover, that the said *Hugh* did likewise permit the said *Anne* to retain possession of the goods, merchandise and furniture, by the bill aforesaid to him conveyed, and to use and dispose of the same at her pleasure, and to take, receive and enjoy the profits thereof, as if the said bill of sale had not been made, to the great injury and wrong of the creditors aforesaid, and in furtherance and consummation of the frauds, wherefore said deed and said bill of sale were executed, as has been alleged; that continuing indebted and insolvent as aforesaid, and deriving her maintenance chiefly from and through the frauds aforesaid, having, on or about the 20th December 1844, given her four promissory notes, (as by the instrument hereinafter referred to will appear,) with a certain *Joseph D. Worley*, as her security to *Thomas Flint & Co.*, for a debt due to the said firm by her deceased husband, whose administratrix she was, for which debt she was in nowise personally liable, having in no way wasted the estate of her said

Schwenniski and wife, *et al.*, vs. Glenn.—1846.

husband ; knowing moreover the said *Anne*, that she should, and was about to apply for the benefit of the insolvent laws of *Maryland*, which she did but two days afterwards ; she, the said *A. W.*, on the 20th March 1845, for the purpose of further carrying out the frauds aforesaid, executed and delivered unto the said *Worley*, a deed of mortgage of all the remaining property of her, the said *Anne*, to wit : her interest in the estate of her deceased husband, *Donald Watson*, for the ostensible purpose of securing the said *Worley* against loss upon the promissory notes aforesaid, and two other notes, which are referred to in said mortgage, though the amount thereof is not therein stated ; that the said *Worley*, at the time when he became surety upon the notes in said mortgage referred to, was in possession of the house and lot aforesaid, on *Pratt street*, fraudulently, as aforesaid, conveyed to *Hugh McNeal*, and it was agreed by and between the said parties, that he should be indemnified from the rents of said house and lot, against loss by his said suretyship ; and your orator charges, that by means of said rents, said *Worley* has been so indemnified, and that some of said notes, or all of them, without loss of said *Worley*, have been paid, and that said *Worley*, therefore, has continued in possession of said house and lot, and has received the rents, profits and advantage thereof. Now, therefore, your orator avers and charges, that the said mortgage was fraudulently made and executed by the said *Anne Watson* to said *Worley*, with intent and purpose to hinder and defraud the creditors of said *Anne Watson*, of their just and lawful debts and actions, and to disturb, hinder and defraud the said creditors, and to lessen, dispose of, and convey the property, right and claims of the said *Anne Watson*, thereby to deceive and defraud her said creditors, and to secure the said property, rights and claims, to receive and expect profit and advantage thereby, and with a view and under an expectation of being and becoming an insolvent debtor, and with an intent thereby to give an undue and improper preference, and that the said mortgage, moreover, is defectively and insufficiently executed ; that afterwards, about the 22nd of March 1845, two days only after the date of the deed of mortgage aforesaid, said *Anne Watson* petitioned for the benefit of the

Schwenniski and wife, *et al.*, vs. Glenn.—1846.

insolvent laws, and your orator was duly appointed her permanent trustee, and gave bond as such, according to law ; wherefore your orator says, that the deeds aforesaid are, and each of them is, utterly null and void, and that the property thereby pretended to be conveyed, of right belongs to your orator, for the benefit of the creditors of said *A. W.*; and your orator alleges, that the property, by said last mentioned mortgages, pretended to be conveyed, consists of the interest of said *Anne Watson*, as widow of *Donald Watson*, in certain leasehold premises on *Marsh Market* space, in the city of *Baltimore*, now, and, for some time past, rented to a certain *Henry Fay* and *Albert Meteer*, from whom your orator is entitled to receive the share of the rents and profits to which said *Worley*, by said mortgage, pretends to have claimed, but who continue to pay the same to said *A. W.*, and not to your orator.

The bill then prayed for a discovery by *H. McN.* and *J. D. W.*, an account of rents, profits and sales ; deeds to be decreed void ; *subpœna*, and for general relief.

With this bill were exhibited the several conveyances mentioned in it.

Afterwards the complainants filed their petition, charging, that the said *Anne*, and a certain *John Schwenniski*, with whom she hath, since said bill was filed, intermarried, having notice of said bill, and with intent to interfere with the authority of this court, and to thwart your petitioner in the relief which he had prayed, did, on the 4th October 1845, cause to be issued, or did issue a warrant of distress, directed to, &c., commanding him to distrain the goods of, &c., for part of the said rents, which he accordingly did, and do now intend, and are about so to proceed against the goods and chattels of, &c., when the rent next to become due from him shall accrue, notwithstanding the pendency of the proceedings aforesaid, in contempt of this court and its jurisdiction, already accrued, and to the interruption of your petitioner, and the relief by him prayed. Prayer, that the said *J. S. and wife*, may be attached to answer to this court of the contempt aforesaid, and that your honors will cause to be issued the writ of injunction, to the said *J. S. and Anne S.* directed, enjoining and restraining them, and

Schwenniski and wife, *et al.*, vs. Glenn.—1846.

each of them, and their, and every of their servants, bailiffs or agents, and all other persons whatsoever from meddling with the rents of the share of said property, by your petitioner claimed in his said bill, and from interfering with the same in any manner whatsoever, &c.

Upon this petition, (ARCHER, C. J.,) on the 7th October 1845, ordered, that injunction issue as prayed, to operate during the pendency of the suit of the complainant, upon the petitioners executing a bond, with security, to be approved by one of the judges of this court, in the penal sum of, &c., conditioned to indemnify the defendants herein.

The defendants, *H. McN.* and *J. D. W.*, answered the bill, but their answers are deemed unnecessary to be stated upon the appeal from the injunction, granted upon the petition of the complainants.

The answer of *J. Schwenniski and wife*, to the said petition, alleged, that by the bill of complaint of said *John Glenn*, referred to in his said petition, it is shewn, that this respondent, *Anne*, was, at the time of filing said bill of complaint, and these respondents aver that she still is, administratrix of all the goods, &c., which belonged to *Donald Watson* in his lifetime, and as such administratrix, these respondents charge, that she now has, and had at the time of filing the said bill and petition of *John Glenn*, a perfect legal right to sue for, demand, and receive the rents coming due on the property situated on *Frederick street* and *Marsh Market space*, as described in the petition of said *John Glenn*, inasmuch as the said property was leasehold estate, held by said *D. W.* at the time of his death, all of which these respondents offer themselves ready to prove, if denied by said *John Glenn*. And these respondents further answer and say, that the said administration on the estate of said *D. W.*, is not yet fully settled up, and that no distribution has ever been made between the children of said *D. W.* and this respondent, *Anne*, his widow, in respect to said leasehold property. That the said *J. G.* had not been duly appointed permanent trustee of *A.*, who denied the frauds alleged against her, &c.

Schwenniski and wife, *et al.*, vs. Glenn.—1846.

The cause, upon the suggestion of the defendants, was then removed to the court of chancery, where exceptions were taken to the answers.

It was then agreed, that the rents covered by the injunction, issued from leasehold estate belonging to *Donald Watson*, in his lifetime; and the proceedings of the insolvent commissioners of *Anne Watson*, for relief under the insolvent law, were filed in the cause. She made her application on the 22nd March 1845, and the complainant bonded as her permanent trustee on the 7th May 1845.

On the 21st January 1846, the chancellor, (BLAND,) ordered, "that as this court cannot revise, alter or reverse any judgment of the court, from which the case has been brought, that the order of the 7th October 1845, (which granted the injunction,) stand and remain in full force, according to its terms," from which order the defendants appealed to this court.

The cause was argued before DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By HORSEY for the appellants, and
By GLENN for the appellee.

MAGRUDER, J. delivered the opinion of this court.

The injunction in this case was granted, to prevent *John Schwenniski* and his wife, from collecting rents due for a house and lot, which had been mortgaged by the latter to the appellant, *Joseph D. Worley*,. The mortgage is alleged to be fraudulent as against creditors, and the bill of complaint is filed by the appellee, who is the permanent trustee of the wife, she having applied for the benefit of the insolvent law. It appears, however, that in this property the former husband of the wife of the first named appellant had a leasehold interest; that he died intestate, and his widow administered upon his estate.

It is nowhere alleged, and the administratrix expressly denies, that the estate has been distributed; and it would seem, that some of the debts due from the deceased are yet unpaid. The administratrix, then, still holds the property in that cha-

Harden vs. Campbell.—1846.

racter, and in that character is bound to rent it, and collect the rents, and account for them, as a part of the estate of her husband.

It may be that the administration ought some time ago to have been closed, and the widow's interest in it ascertained. But this the bill, taken in connection with the answer, will not authorise this court to presume. Until this distribution is made, the court cannot say that the appellee, as permanent trustee, has any title to this portion of the intestate's estate; and it is in his power at any time to apply to the orphans court, for a distribution of it among the widow and her children; one of whom is made a party to the bill of complaint.

Order of chancellor, continuing the injunction, reversed, and the injunction dissolved. ORDER REVERSED.

WILLIAM HARDEN vs. GEORGE CAMPBELL.—*June* 1846.

At common law, the release of the debtor, whose person is in execution, is a release of the debt, and he cannot afterwards be arrested on the same judgment.

The law will not permit a creditor to proceed at the same time against the person and estate of his debtor, and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released.

To a *scire facias* to revive a judgment, the defendant pleaded in bar his prior arrest upon a *ca. sa.*, his appearance in court at the return of the writ in custody, his being called, and answering in court that he was the party arrested, the refusal of the plaintiff to pray him in commitment, and his offer of himself to the sheriff, and the refusal of the sheriff to receive him into custody; upon general demurrer, held a bar to the writ.

The case of *West's executor, vs. Hyland, 3 Harris & Johnson, 200*, is imperfectly reported. In that case, the sheriff did not bring the body of the defendant into court on the return of the first *ca. sa.*, and the defendant, after its service, escaped from the custody of the sheriff, before the second *ca. sa.* was issued.

An escape from the sheriff, without the consent of the creditor, does not prejudice him or extinguish his judgment.

APPEAL from *Carroll* county court.

This was a *scire facias*, sued out on the 31st August 1843, by the appellee against the appellant, to revive a judgment at

Harden vs. Campbell.—1846.

law, and show cause why an execution should not be awarded, &c.

The appellant, the defendant, pleaded, that on the 11th September 1838, the plaintiff sued forth upon the original judgment a writ of *capias ad satisfaciendum*, upon which the defendant, before the return, was arrested and detained in execution, and that the said writ was so returned at the return day thereof, as appears, &c.; wherefore he prays judgment, if the said plaintiff ought to have his execution against him, &c.

The second plea further alleged in substance, that the defendant appeared in court, confessed himself the person, &c., and that the plaintiff, upon demand of the court, refused to pray the defendant in commitment, &c.

The third plea alleged, that the defendant being arrested, at the return day of the writ of *ca. sa.*, appeared in court and offered himself in custody to the sheriff of the county, who refused to receive him, &c.

To these pleas the plaintiff demurred generally, and the county court awarded execution to the plaintiff, for, &c. The defendant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By C. BIRNIE, for the appellant.

By W. P. MAULSBY, for the appellee.

MARTIN, J., delivered the opinion of this court.

In this case, a *scire facias* was issued by the appellee, for the purpose of reviving a judgment against the appellant.

In the pleas filed by the appellant, he alleges, that he had been arrested under a *capias ad satisfaciendum*, which the appellee had caused to be issued on the original judgment; that on the return day of the writ, he appeared in court, in the custody of the sheriff; that he was called on the *capias*, and answered and avowed himself in court, under the previous arrest; that the plaintiff, although demanded by the court, if he prayed a commitment of the defendant, refused to pray such

Harden vs. Campbell.—1846.

commitment ; and that being in court under the arrest, as before stated, he offered himself to, and required the sheriff to receive him into his custody, which the sheriff refused to do. To these pleas there was a demurrer, and the only question presented for the consideration of this court, is, whether, assuming the facts stated in the pleas to be true, the appellee would have been precluded from issuing a second *capias ad satisfaciendum*?

It is an established principle, that at common law, the release of the debtor, whose person is in execution, is a release of the debt, and he cannot afterwards be arrested on the same judgment. The body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor, and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary discharge of the person by the creditor. 1 *Pet.*, 575. In conformity with this principle, it was held, in *Basset against Salter*, 2 *Mod.*, 136, that if there be an escape, with the plaintiff's consent, the debt is discharged, though, if it happened without his concurrence, the result would of course be different, and he might issue a second *capias*. In *Jaques against Withy*, 1 *Term R.*, 557, the creditor discharged his debtor in execution, upon his giving a part security to satisfy the judgment. The security was invalidated on account of a mere formality ; yet it was held, that the judgment was satisfied, the court affirming, that where a prisoner obtains his discharge, with the consent of the party who put him in execution, he cannot be re-taken. The same proposition is stated in *Clark vs. Clement & English*, 6 *Term R.*, 525 ; and in *Tanner against Hague*, 7 *Term*, 420, where it is announced, that the cases proceed on the ground of its being considered that the plaintiff received satisfaction in law, by having his debtor once in custody on execution. 2 *East R.*, 243. 5 *John.*, 364.

It is perceived, that the authorities adverted to, treat the rule as settled, that when a defendant in execution is permitted to

Harden vs. Campbell.—1846.

depart from the custody of the sheriff, with the consent of the creditor, at whose instance he was arrested, the judgment is discharged in law, and he cannot be re-taken. It is apparent from the facts set forth in the second and third pleas, which are, in the present posture of the case, to be received as true, that the appellant was discharged from the custody of the sheriff, with the consent of the appellee, and without his own concurrence, for it is stated, that he surrendered himself, and asked to be retained in custody in satisfaction of the judgment. Under such circumstances, it is plain, we think, that the defendant could not have been arrested on a second *capias ad satisfaciendum*, and that the demurrer to the pleas ought to have been overruled.

It has been supposed, however, that the doctrine thus announced is in conflict with the principle decided by the Court of Appeals, in 1811, in the case of *West's Executor, against Hyland*, 3 H. & J., 200.

In that case it appeared, that a *ca. sa.* was issued on a judgment affirmed in the Court of Appeals, on appeal from *Somerset* county court. The defendant was taken in execution under this *ca. sa.*, and appeared in court in the custody of the sheriff.

The counsel for the defendant, moved the court for a rule on the plaintiff, to show cause why the writ of *ca. sa.* ought not to be quashed, upon the ground, that the defendant had been taken in execution under a *ca. sa.*, issued by the plaintiff upon the same judgment, returnable to the last term of the court; that it was returned by the sheriff, *cepi*, and that the defendant appeared in court at the return day of the writ; but the plaintiff did not move in court to have the defendant committed, nor did he call on the sheriff to bring into court the body of the defendant, nor did he do any thing therein, but that the *ca. sa.* stood open upon the docket of the court under the sheriff's return of *cepi*, and that the present *ca. sa.* was a renewal of the former writ. The counsel for the defendant contended, that he was released from the debt by the plaintiff's neglect to enforce the former *ca. sa.*, by defaulting the sheriff, committing the defendant to the custody of the sheriff, or having the case not called with the consent of the defendant; and

Harden vs. Campbell.—1846.

that he could not again be taken in execution under a new *ca. sa.*, whilst the former stood under a *cepi*, and not acted upon. The court said, “that the return of *cepi* to the former *ca. sa.*, and the plaintiff not proceeding to enforce that writ, by having the defendant committed, defaulting the sheriff, or an entry of not called, did not preclude the plaintiff from again taking out a new *ca. sa.*”

An examination of the papers in this case has satisfied us, that it has been most imperfectly reported. It appears, that the plaintiff in his answer to the motion of the defendant, to show cause why the execution should not be set aside, assigned this as his first reason: “Because, upon the said *ca. sa.*, which had been issued returnable to the last term of the court, the said sheriff did not bring the body of the said *Lambert* into court to satisfy the said execution, when he ought to have done, but that the said *Lambert*, before the said last *ca. sa.* was issued against him, and after the first *ca. sa.* had been served upon him, had escaped from the custody of the said sheriff.” This allegation was supported by affidavits.

The proposition is firmly established, that an escape from the sheriff, without the consent of the creditor, shall not prejudice him, or extinguish his judgment. He has the right to sue the sheriff, but he is not obliged to do so, and may re-take his debtor under a second *capias ad satisfaciendum*. *Basset vs. Salter*, 2 *Mod.*, 136. 5 *Pet.*, 369.

The opinion of the court in *West against Hyland*, is to be considered in connection with the circumstances of the case, as they really existed, and is explained by the important fact omitted by the reporter, that the defendant had escaped from the first *ca. sa.*

In this respect, we think the case of *West* and *Hyland*, is clearly distinguishable from the one now under examination, and that the court below erred in sustaining the demurrer, as it regards the *second* and *third* pleas. The judgment is therefore reversed.

JUDGMENT REVERSED.

Hamilton, *et al.*, vs. Ely, *et al.*—1846.

EPHRAIM HAMILTON, ET AL., vs. HUGH ELY, ET AL.—
June 1846.

Upon the allegation of tenants in fee, that the defendants, confederating together, entered upon their land, cut down large quantities of wood, quarried large quantities of limestone, are continuing to cut down wood and quarry stone, and design to remove the same; that they have instituted actions of *t. q. c. f.*, for the said trespasses, which are now depending, an injunction will not be granted to restrain further acts of trespass or waste.

In such a case, to authorise an injunction, the allegation, that the trespass was to the destruction of the inheritance; or, the mischief irreparable, is essential; and the facts must be stated, to show that the apprehension of further acts of trespass was well founded, to satisfy the conscience of the court.

Where the bill charges a mere trespass, where the injury is not irreparable and destructive to the complainant's estate, but is susceptible of perfect pecuniary compensation, for which the party may obtain adequate satisfaction at law, and no charge of insolvency in the defendants, an injunction ought not to be granted.

Under what circumstances will the quarrying of stone be considered an irreparable injury to the inheritance. *qr.*

APPEAL from the Court of Chancery.

The bill in this cause was filed on the 31st July 1845, by *Hugh Ely, Joseph J. Speed, John Johnson* and *J. N. Steele*, and alleged, that they are seized in their demesne, as of fee, as tenants in common of a certain tract of land lying and being partly in *Howard* district, and partly in *Baltimore* county, called "*Ely's Chance*," which was patented to the said *Hugh Ely*, by patent bearing date the 6th day of July 1830; that *David Lemmon, Ephraim Hamilton, and Elias Hamilton*, co-operating and confederating together, and acting jointly, have entered upon said tract, cut down large quantities of wood, and quarried large quantities of limestone, and that they are continuing to cut wood, and quarry stone as aforesaid; and that, as your orators believe, they design to remove said wood and limestone, already cut and quarried as aforesaid; your orators further show, that they have instituted actions of trespass *q. c. f.*, against *Ephraim* and *Elias Hamilton* in *Baltimore* county court, and against *David Lemmon* in the court

Hamilton, *et al.*, vs. Ely, *et al.*—1846.

of *Howard* district for the trespasses committed, which said actions are now depending. Prayer, that the said *E. H.*, *Elias H.*, and *D. L.*, may answer the premises, and that your orators may have such relief as their case may require; for injunction to the said *E.*, *Elias* and *D.*, directed, prohibiting and enjoining them from cutting down and felling the trees in said tract, and from removing the said wood, so as aforesaid cut down and now lying on the premises, and from removing the stone already quarried, or from burning the same; and from quarrying any more stone, and from committing any waste or trespass on said land and premises, and any part thereof, until the further order of this court; and for *subpœna*.

On this bill the chancellor, (BLAND,) on the 31st July 1845, ordered *subpœna* and injunction to issue, as prayed.

The answer of the defendants alleged, that one *Charles D. Warfield*, of *Howard* district, is seized and possessed of a tract or parcel of land called, "*I can do it well*;" which lies partly in said *District* and partly in *Baltimore* county; and that they have been, and at the time of the service of the injunction in this case, were employed by him in quarrying limestone, of which large deposits are to be found on said land; and for the purpose of converting the same into lime, have cut, as the servants of said *Warfield*, quantities of wood growing on said land; but in so doing, they deny they have wasted or lessened the value of said land. They aver that said land is chiefly valuable because of lime deposits, and can be made a source of profit only by the quarrying thereof. These defendants also admit, that some years ago the complainant, *Ely*, obtained out of the land office a patent for a parcel of land, called *Ely's Chance*, which includes within its location a part of the aforesaid tract, called "*I can do it well*." But as the last named tract is older than *Ely's Chance*, these defendants are advised, and do deny, that the said *Ely*, by color of his patent, obtained title to any part of the land included within the limits of "*I can do it well*," and so they deny that they have trespassed, or that they design to trespass, on any part of the land whereof the said *Ely* has, or at any time had, under color of his aforesaid patent, the seisin or

Hamilton, *et al.*, vs. Ely, *et al.*—1846.

possession. These defendants know nothing of any seisin or possession of said premises by the other complainants, other than that these defendants understand and believe they claim title thereto under the complainant *Ely*. And these defendants say, that in the month of April in the year 1842, the said *Hugh Ely* filed his bill of complaint in this honorable court against the said *Charles D. Warfield*, asserting the title, which is now pretended by the complainants in this suit, and praying for an injunction to prevent the said *Warfield*, his agents and servants, from trespassing on the lands which is pretended in the present bill to belong to the complainants. Upon which said bill an injunction was granted, as prayed ; that the said *Warfield*, having filed his answer to said bill, and having appealed from said order, such proceedings were had, that at June term, in the year 1842, the said order was reversed, and the injunction, issued as aforesaid, dissolved ; and by the aforesaid bill, answer, and other proceedings, now in this court will appear ; and these defendants pray leave to refer thereto, for the purpose of showing, that the title put in issue in said cause is identical with the title at issue in this cause, and that the changes introduced in regard to the parties, complainants and defendants, are mere devices to escape the effect and consequences of the decision made in the former cause ; and these defendants are therefore advised, that if the said complainants had truly disclosed all the proceedings which have taken place in said former cause, and had also confessed, as your defendants are informed and verily believe to be true, that the said other complainants acquired the title, which they pretend from the said *Ely*, subsequent to, and with notice of said former proceedings, your honor would not have granted an injunction in this cause ; admitting, therefore, that actions of trespass have been brought against them, as charged by the complainants, and are yet depending, these defendants insist, the injunction issued in this cause was irregularly obtained, and pray the same may be dissolved, &c.

The various proceedings referred to in the defendant's answer, were filed therewith ; but a particular notice of any of them is unnecessary.

Hamilton, *et al.*, vs. Ely, *et al.*—1846.

On the 30th March 1846, a motion to dissolve the injunction came on for hearing, when the chancellor, (BLAND,) ordered it to be continued until final hearing, or further order.

The defendant appealed from that order, under the act of 1835.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By ALEXANDER for the appellants, and

By J. JOHNSON for the appellees.

SPENCE, J., delivered the opinion of this court.

The bill in this case charges, that the complainants were seized in their demesne, as of fee, as tenants in common of a certain tract of land containing thirty-one and one-quarter acres, more or less, lying and being partly in *Howard* district, and partly in *Baltimore* county, called *Ely's Chance*. That the respondents, "co-operating and confederating together, and acting jointly, have entered upon said tract of land and cut down large quantities of wood, and quarried large quantities of limestone, and that they are continuing to cut down wood and quarry stone ; and as the complainants believe, design to remove said wood and limestone, already cut and quarried."

The complainants further charge, that they have instituted actions of trespass *quare clausum fregit*, against the respondents for the trespasses committed, which actions are pending. The bill prays, that an injunction may issue enjoining the respondents from cutting down the trees on said tract of land, and from removing the wood so cut, and the stone quarried, from said land, and from burning the same, and from committing any waste or trespass on said land. On which bill, the chancellor passed the following order: "Let writs of *subpoena* and injunction issue, as prayed by the foregoing bill."

The bill in this case, neither alleges the trespass as going to the destruction of the inheritance, nor the mischief as irreparable. If the bill did contain such allegations, that would not be sufficient, the facts must be stated to shew the apprehension of

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

further acts of trespass, well founded, to satisfy the conscience of the court; “without such a statement of facts, no injunction should have issued; and this defect in the bill, even if such a remedy were applicable to such a case, is not cured by the testimony taken in the cause.” *Amelung and others, vs. Seekamp*, 9 G. & J., 474.

It is not the established chancery doctrine in *Maryland*, to restrain the repetition of a mere trespass, pending proceedings at law to try the right. The learned judge, in the case of *Amelung and others, vs. Seekamp*, says, “it has never received the sanction of the appellate tribunal of this State, and will not be sustained by this court.”

The bill, in this case, charges a mere trespass, where the injury is not irreparable and destructive to the plaintiff’s estate; but is susceptible of perfect pecuniary compensation, for which the party may obtain adequate satisfaction at law.

We do not mean to say, that under certain circumstances, the quarrying of stone might not be an injury to the inheritance; but that, in this case, no such circumstances are averred, as shew that the quarrying of stone would be irreparably injurious to the inheritance.

There is no charge of insolvency of the respondents.

This case falls within that class of cases, in which chancery will not restrain by injunction. Vide *Amelung and others, vs. Seekamp*, 9 G. & J., 468.

This court will sign a decree, reversing the chancellor’s order continuing the injunction, and remand the cause.

ORDER REVERSED AND CAUSE REMANDED.

EDWARD R. WHEELER AND OTHERS, vs. JOSEPH STONE
AND OTHERS.—*June* 1846.

An appeal taken from an order of the court of chancery, prohibiting the sale of property, after the lapse of nine months from its passage, dismissed, as not being taken within the time prescribed by law.

No appeal will lie from an order of a court of chancery, requiring a trustee, a defendant in the cause, to bring money and securities in his hands into

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

court,—nor from an order directing the clerk of the court to deposite money brought into court, in bank, and referring the case to the auditor, with directions to distribute such money according to legal priorities,—nor from an order referring the cause to the auditor, with directions to state an account from the pleadings and proofs.

From mere practical, preparative orders, made in the progress of a cause, not final in their nature, and which do not profess to determine the question of right between the parties, no appeal lies.

An order for the sale of real and personal property, is the subject of an appeal under the act of 1841, ch. 11, sec. 1.

Where the grantor in a deed never becomes an applicant for relief under our insolvent laws, it cannot be pretended that his deed was made with a view of becoming an insolvent debtor.

Where a deed of trust was made to indemnify the securities of the grantor, as sheriff and collector, one of his deputies, who advanced him money to pay off official defalcations, is not within the terms of the deed. For the debt thus created, the grantor is liable in his individual character.

Neither is the holder of a bill on the grantor, accepted by him, in favor of such holder, within its terms; though, in fact, drawn by one who had official claims on such grantor: as his official bond would not be liable on the mere acceptance of such a draft.

A bill of exchange, although accepted, unless drawn on a particular fund, does not operate to invest the payee, with the character of an assignee of such fund.

APPEAL from the Court of Chancery.

The bill in this case was filed on the equity side of *Charles* county court, on the 13th June 1844; and subsequently removed from that court to the court of chancery. The complainants, *Joseph* and *William B. Stone*, alleged, in substance, that *Edward R. Wheeler* having been sheriff and collector of *Charles* county, becoming officially indebted to various persons—to said *Joseph*, one of his deputies, who advanced him money to pay official liabilities and defalcations; to said *William B. Stone*, as assignee of fees placed with the said *E. R. Wheeler* for collection, for which he had given his acceptance, on the 21st March 1844,—executed a deed to *Robert S. Reeder*, for a nominal consideration, of all his estate, real, personal and mixed, reciting his indebtedness for which his official securities may be responsible, in trust; that is to say, whereas the said *E. R. W.* was late sheriff of *Charles* county, *Maryland*, and as such was compelled to give bond, and also was compelled to give bond as collector

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

for the aforesaid county, on which bond the following persons are and were security, to wit, *Robert Gray, &c.*, which bonds are now in suit in the county court of *Charles* county, and whereas the said *E. R. W.*, stands indebted to *Henry C. Matthews*, for the rent of the place on which he now lives, which last claim is first to be paid out of the property above specified, and also is indebted to *John H. Burrows, &c.*, not mentioning either of the complainants. And whereas it is the wish and determination of him, the said *E. R. W.*, by and from the property hereinbefore conveyed, to indemnify and hold harmless, and provide for the payment of any and all the debts and claims above mentioned, particularly as well as for the perfect and certain indemnification of the above named securities, for and on account of any claim for which the said *E. R. W.* may, or can in any manner become liable, as late sheriff, or collector, of *Charles* county, it is therefore hereby declared to be the meaning of these presents, and of the parties thereto, that all the premises herein and hereby bargained, sold and conveyed, or intended to be bargained, sold and conveyed to him, the said *R. S. R.*, in manner aforesaid, are to be held, deemed, and taken, in trust and confidence; in the first place, to raise by sale of the same, or any part thereof, in such manner as the said *R. S. R.*, and the securities above mentioned, shall think proper, for so much money as will be sufficient therefor; and the same money, when raised, to apply to the purpose of paying off, satisfying and discharging, all and singular, the said debts, together with all interest and costs that has or may have accrued, or may accrue thereon; and in all respects to save harmless, indemnify and reimburse, the above named securities and creditors, on account of any thing for which they are now, and may become in any manner liable, on account of the said *E. R. W.*, as sheriff; and for the security and settlement of the above named debts, &c.

The bill then alleged the indebtedness of the said *E. R. W.* to other persons, not mentioned in said deed; that he continued to have the sole and exclusive use of the property mentioned therein, without hire and profit to his creditors; that

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

the perishable property was consumed by his use, while the interest on his debts was accumulating; that he knew when he made said deed, he was in failing circumstances, and that he then contemplated and determined upon taking the benefit of the insolvent laws; that the said deed is fraudulent as against said complainants and other creditors, in like circumstances; that they have claims upon his official bonds; and the evidence they now hold of their debts—notes and acceptances—were not designed to change the nature of their claim, which are in fact debts due from *E. R. W.*, as sheriff and collector. Prayer, that the deed may be set aside, or the trustee compelled to sell upon terms to be prescribed by the court; and complainant's claims placed upon an equal footing with those in the deed; for *subpœna* and general relief.

With this bill the complainants filed, as a part thereof, the evidence of their claims, viz., the single bills of *E. R. W.*, in favor of *Joseph Stone*, of the 20th March 1840, and 22nd March 1844, for \$100, and \$575; and an order of *C. W. Semmes* on *E. R. W.*, in favor of *W. B. S.*, dated 21st June 1841, for \$374.21, accepted, and alleged to be due for fees.

The answer of *Robert S. Reeder*, and others, admitted the execution of the deed of trust; alleged their ignorance of the complainant's claims; that said claims are not provided for by the deed of trust; the use of the property by *E. R. W.*, until a sale could be effected, was also admitted; that the trustee is proceeding to dispose of the property; that it is sufficient to pay his just debts; that he had a right to make the preferences which he did make, as he had often promised to indemnify his securities on his official bonds, &c.

The answer of *E. R. W.*, was similar to that of the other defendants, except that he admitted the nature and origin of the complainants' claims, as alleged by them.

On the 28th March 1845, the complainants, upon petition, that the trustee, since the filing of the bill, had sold a part of the property, and converted the proceeds to purposes unknown and injurious to the petitioners, and was about to sell other parts of the property, obtained an injunction from *Charles* county court, preventing further sales.

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

The trustee answered this petition, and admitted a sale of a negro man: the proceeds of whom had been applied according to the deed of trust.

Upon a motion for a dissolution of the injunction, on the 17th June 1845, *Charles* county court, (DORSEY, A. J.,) dissolved the same, and adjudged, that the trustee, *R. S. R.*, be directed to proceed in the due discharge of his duties as trustee, in the following manner:—after due and sufficient notice by him to be given, he proceed to sell the negroes in the deed of trust in the proceedings mentioned, to the highest bidder, at public sale, for cash; and also all other property conveyed by the said deed of trust, upon a credit, &c.; settle and collect all claims, dues and debts, due and assigned by said deed; and that he, the trustee, report to this court the several amount, &c., of claims and debts due by the said *E. R. W.*, provided for under the said deed, so far as he may be able to ascertain them; and that he, the said trustee, bring the money and bonds arising from the sale of the property aforesaid, and collections aforesaid, into this court, for the future disposition thereof by order of this court; question of costs is reserved till final decree.

Upon further proceedings the county court, on the 6th September 1845, ordered the trustee, *R. S. R.*, to bring into court the securities and money by him received for the sale of the property under the decree in this cause, and that he give bond, with one sufficient security, in the penalty of \$10,000, for the due performance of his trust under the decree.

The trustee reported his sales, disbursements, and payments; and brought into court, notes and money to amount of \$2664.19, &c.; when the cause, on the 1st November 1845, was referred to the auditor, to state an account with the trustee and distribute the balance, according to legal priorities; that the trustee proceed to collect the money due the fund, and be enjoined from paying any money he may receive, until further order; and that, as collector, he bring the money received into court.

The trustee made a further report of sales, to which the complainants excepted, and upon the suggestion of *R. S. R.*, the cause was removed to the court of chancery.

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

On the 23rd January 1846, the chancellor, (BLAND,) passed the following order : It appearing from the proceedings, and more especially from the decree of the 17th June last, that the deed of trust of the 21st March 1844, has been adjudged to be valid; it is therefore ordered, that this case be, and the same is hereby referred to the auditor, with directions to state an account, &c.

The defendants then appealed from the order of the 27th March 1845; the decree of 17th June 1845; the order of 5th September 1845; of the 1st November 1845; and of the 23rd January 1846; to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By REEDER and CRAIN for the appellants, who contended :

1st. That the deed of trust was made to protect the securities and creditors of *Edward R. Wheeler*, as recited in said deed of trust; that it was *bona fide*, and not fraudulent; and *Charles* county court, sitting as a court of equity, should have dismissed the bill.

2nd. Because there was no proof taken in the cause, to justify a reference of the case to the auditor.

3rd. Because the securities and creditors of *Edward R. Wheeler*, for whose benefit the deed was made, never admitted the debts of complainants.

4th. Because, admitting the validity of the deed of trust, the order upon the trustee to give bond, for the faithful discharge of his duties as such, at the instance of the complainants, was illegal and improper.

5th. Because the order of the first of November was prejudicial to the rights of the parties under the deed of trust, and in derogation of it.

6th. Because the order of the chancellor was inconsistent with a confirmation of the deed, and in violation of the rights of the parties under the deed.

7th. Because the bill of complaint of the appellees, should have been dismissed by the judges of *Charles* county court;

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

and, because the order of the first of November, enjoining the trustee from paying any of the money, in discharge of claims against the *cestui que trusts*, mentioned in the deed of trust, was illegal, unjust, and oppressive.

8th. Because the court had no right to require *Robert S. Reeder*, the trustee, to bring the money into court, as it was inconsistent with the stipulations and covenants in the deed.

By J. JOHNSON for the appellees :

1st. That as by these orders, taken separately or collectively, no question of right is decided, the appeal should be dismissed.

2nd. That if this court will entertain the appeal, then it will be insisted, that the equity court having full jurisdiction over the subject, the several orders appealed from were all proper to be passed, and will, consequently, be affirmed.

MARTIN, J., delivered the opinion of this court.

In this case, the appellees, representing themselves as creditors of *Edward R. Wheeler*, on the 13th of June 1844, filed their bill of complaint, on the equity side of *Charles* county court, for the purpose of vacating a deed of trust, which had been executed by *Edward R. Wheeler to Robert S. Reeder*, on the 21st of March 1844, on the ground that it gave an undue preference to a portion of his creditors, and that it was made in view of taking the benefit of the insolvent laws; and also for the purpose, in case the deed could not be vacated, of obtaining a decree for the sale of the property, and for general relief.

To this bill answers were filed by the defendants. The defendant, *Edward R. Wheeler*, admitted the claims of the complainants, but averred, that the deed of trust was made in pursuance of an agreement between himself and his securities, upon his bonds, as collector and sheriff of *Charles* county, to indemnify and save them harmless against their liabilities as securities, and not with a view of an undue and improper preference, or to take the benefit of the insolvent laws; that the conveyance was *bona fide*, and the grantor solvent and able to pay his debts.

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

After the answers had been filed, the court, upon the petition of the complainants, passed an order on the 27th of March 1845, prohibiting the trustee from disposing of any of the property in the deed, without the authority of the court.

An answer having been filed to this petition, the case was set down for final hearing, and the court, on the 17th of June 1845, passed an order dissolving the injunction, directing the trustee to sell the property, on certain specified terms, and to bring the money into court for future distribution.

On the 6th of September 1845, the court passed a second order, requiring the trustee to bring the money and securities in his hands, into court, by a day limited, and that he give bond as trustee.

On the 1st of November 1845, the trustee having made a report, showing the balance in his hands, in notes and money, which he states was brought into court; the court, on the same day, passed an order directing the clerk to deposit the money in bank, and referring the case to the auditor, with directions to distribute the money according to legal priorities.

The case, after some further proceedings, was transferred to the court of chancery, upon the petition of the defendants; and the chancellor, on the 23rd of January 1846, passed an order, in which, after reciting that the deed of trust had been adjudged valid by the decree of the county court, he ordered the case to be referred to the auditor, with directions to state an account from the pleadings and proofs.

The defendants, on the 19th of February 1846, appealed from the order of the 27th of March 1845, the orders of the 17th of June, the 6th of September, and the 1st of November, 1845, and also from the order of the chancellor, of the 23rd of January 1846; and the first question presented for our consideration is, whether the defendants were authorised to appeal from all, or any of these orders?

It is manifest, that the appeal from the order of the 27th of March 1845, must be dismissed, on the ground, irrespective of all other reasons, that it was not taken within the time prescribed by the act of Assembly regulating appeals from the court of chancery, more than nine months having elapsed from the time of the passing of the order.

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

We think it equally clear, that no appeal could be entertained from the order of the 6th of September 1845, the order of the 1st of November 1845, or the order of the chancellor, of the 23rd of January 1846.

These are mere practical or preparative orders made in the progress of the cause, not final in their nature, and which do not profess to determine the question of right between the parties. The appeal, therefore, from these orders must be dismissed.

The order of the 17th of June 1845, stands, however, in a different predicament. It is an order for the sale of real and personal property, and becomes the subject of appeal, by force of the provisions of the first section of the act of Assembly of 1841. That statute confers, in all cases, where there has been a decree or order for the sale of real or personal property, the right of an immediate appeal.

This presents for our examination the correctness of the order of the 17th of June 1845.

We are satisfied, that no ground has been shown by the complainants, on which the validity of the deed of trust of the 21st of March 1844, can be justly disputed. It appears, that *Edward R. Wheeler* never became an applicant for the benefit of the insolvent laws of the State, and under such circumstances it cannot be pretended, that the conveyance was made with the view of becoming an insolvent debtor. This court held, in *Hickly against the Farmers and Merchants Bank*, 5 G. & J., 381, "that under the settled construction of the insolvent laws, the words, with a view, or under an expectation of being or becoming an insolvent debtor, meant, with a view, or under the expectation of taking the benefit of the insolvent laws."

That a debtor, though in failing circumstances, may, independent of the insolvent or bankrupt laws, prefer one class of creditors to others, provided the transfer is made in good faith, is a proposition that cannot be questioned. 5 G. & J., 380. 6 G. & J., 217. We think, therefore, that the deed of trust from *Edward R. Wheeler* to *Robert S. Reeder*, is to be regarded as a valid conveyance.

Wheeler, *et al.*, vs. Stone, *et al.*—1846.

The right of the complainants to file the petition of the 28th of March 1845, and invoke the interposition of the court, has been placed on the ground that the complainants were creditors of *Edward R. Wheeler*, as sheriff, and therefore provided for by the terms of the deed of trust.

If the counsel for the complainants could have maintained his first proposition, he would have placed the appellees within the protection of the conveyance, because the object of the trust was to secure the payment of all the claims for which the bonds of the grantor were responsible, as collector and sheriff of *Charles* county.

But this, in our opinion, he has not accomplished.

It is plain, that the debt due from *Edward R. Wheeler* to *Joseph Stone*, was for money loaned by *Stone* to *Wheeler*, and for which *Wheeler* was responsible in his individual, and not in his official capacity.

The debt due from *Edward R. Wheeler* to *William B. Stone*, was created by a bill of exchange, drawn by *Charles W. Semmes* on *Edward R. Wheeler*, in favor of *Stone*, for the sum of three hundred and seventy-four dollars and twenty-one cents, and accepted by *Edward R. Wheeler*.

It is not contended, that the official bonds of *Wheeler* would be responsible for the payment of this draft, on the mere acceptance of *Wheeler*; but it was insisted, that as it appears from the admissions of *Wheeler* in his answer, that the debt due from *Wheeler* to *Semmes*, the drawee of the bill of exchange, was created by fees placed in his hands for collection as sheriff, it would have been competent for *William B. Stone* to have proceeded against the official bond of the sheriff, as the assignee of *Charles W. Semmes*, on the original consideration.

An insuperable objection to the view thus presented by the counsel for the appellees, is, that a bill of exchange, although accepted, unless drawn on a particular fund, does not operate to invest the payee with the character of an assignee.

In the case of *Sheppard against the State*, use of *Weisel*, the Court of Appeals, at its last session, held, "that even an accepted bill, unless drawn on a particular fund, does not operate to invest the payee with the character of an assignee of

Dilley vs. Shipley, *et al.*—1846.

the fund. The case in 5 *Hill*, 416, is decisive upon this point. In *Harrison against Williamson*, 2 *Edw. Rep.*, 430, it was determined, that a bill of exchange has not the effect of an assignment of the money for which it is drawn in the hands of the drawee, unless, perhaps, where it is drawn upon a particular fund, and then, indeed, by the law merchant, it loses its character as a bill of exchange."

The complainants having then no interest in the trust created by the deed of the 21st of March 1844, the county court erred in entertaining their petition, and passing, at their instance, the order of the 17th of June 1845. The petition of the complainants should have been dismissed. We think, therefore, that the order of the 17th of June 1845, must be reversed.

The order of the 17th of June 1845, is reversed, and a decree will be signed, dismissing the bill and petition.

DECREE REVERSED, &c.

JOSEPH DILLEY vs. FREDERICK SHIPLEY, LEWIS D. BEALL
AND S. A. LECKEY.—*June* 1846.

S. recovered a judgment against *K. & Co.*, before a justice of the peace. Afterwards, *D.* and *B.* went before the justice to supersede the same; which appeared by an entry on the foot of the judgment, as follows: "Superseded by *D.* and *B.* for twelve months." The act of 1825, ch. 223, sec. 2, which gives the form of the entry of supersedeas, requires the insertion of the date of confessing it, as a part of the entry, which in this case was omitted. Upon a bill, filed by *D.* and *B.*, to restrain execution upon the supersedeas, after the lapse of twelve months, the county court dissolved the injunction as to *D.*, and made it perpetual as to *B.*; *HELD*, upon appeal by *D.*, that it ought to have been made perpetual as to him.

APPEAL from the Equity side of *Allegany* county court.

The bill in this cause was filed on the 8th May 1843, by *Joseph Dilley* and *George W. Bedford*, and alleged, that *Frederick Shipley* obtained two judgments, against *George H. Krebs & Co.*, which said *G. H. K.* is since dead, and insolvent; and *Charles W. Krebs*, the only other partner

Dilley vs. Shipley, et al.—1846.

in said firm of *G. H. K. & Co.*, is also now insolvent. The said *F. S.* recovered the said judgments before one *S. A. Leckey*, a justice of the peace of the said county, against the said *G. H. K. & Co.*, on the 2nd April 1842. One for the amount, of \$34.15, debt, with interest and costs; and the other, for \$82.56, debt, &c. That the said *Joseph Dilley* and *G. W. B.*, were entered by the said *S. A. Leckey*, as superseders in the said judgments, in the words and figures following, to wit, “superseded by *Joseph Dilley* and *George W. Bedford* for twelve months;” is used the same form in each case, as will appear by reference to the copies herewith filed; that the said *F. S.* has caused to be issued an execution or *fi. fa.*, on each of the said judgments, against the superseders of the said judgments, and has placed the same in the hands of *Lewis D. Beall*, a constable, in and for said county; who has seized and taken by virtue of said executions, the goods and chattels of one of your orators, the said *G. W. B.*, and is now about to expose the same to public sale to satisfy said judgments. Your orators are advised, that the said supersedeas’ judgments are illegally taken, and informally entered, by the said *S. A. L.*, and that the same are illegal and void, and that your orators are not in any manner bound thereby; the same not having been taken and entered in the manner and form prescribed by the act of 1825, ch. 223, sec. 2, that the said judgments are illegal and void, for other reasons, in law and fact.

Prayer, that the said *F. S.*, *S. A. L.* and *L. D. B.*, may answer, and by injunction be restrained from further prosecuting the said judgments, and from selling the goods and chattels of your orators, under the said executions, or either of them; and from issuing, having issued, or serving on your orators, any executions whatever, upon the said judgments aforesaid, or either of them; for *subpœna*, and for other and general relief, &c.

With the said bill were exhibited the following copies of the judgments.

Frederick Shipley vs. George H. Krebs & Co.—April 2nd, 1842. Judgment in favor of plaintiffs for \$34.15, dolls. debt,

Dilley vs. Shipley, et al.—1846.

interest from February 19th, 1842, and costs, 58½ cents. Superseded by *Joseph Dilley* and *George W. Bedford*, for twelve months. A true copy, as witness my hand and seal. *S. A. Leckey*.—Seal.

Frederick Shipley vs. Geo. H. Krebs & Co.—April 2nd, 1842. Judgment in favor of plaintiff for \$82.56¼, dolls. debt, interest from February 19th, 1842, and costs, 83½. Superseded by *Joseph Dilley* and *George W. Bedford*, for twelve months. A true copy, as witness my hand and seal. *S. A. Leckey*.—Seal.

On the 8th May 1843, the county court, (MARSHALL, A. J.) ordered an injunction to issue.

The answer of *Frederick Shipley*, after admitting the facts in the bill alleged, stated, that shortly after the entry of said complainants, by the said *S. A. Leckey*, as superseders upon said judgments, to wit, on the 25th April 1842, a deed of mortgage was made between the said *G. H. K.* and the complainant, *J. D.*, in which it is recited, that the complainant *J. D.* had become surety by way of supersedeas, for the said *G. H. K.*; and for *G. H. K.* and *C. W. K.*, in certain judgments in said deed particularly mentioned; among which said judgments, are the two against *G. H. K.*, and *C. W. K.*, at the suit of *F. S.*; and this defendant is advised, that the complainant, *J. D.*, is estopped from averring against the validity of said supersedeas. This defendant further answering, states, as to the complainant, *Joseph Dilley*, that by certain articles of agreement, under seal, entered into between a certain *John Williams* and *Charles W. Krebs* of the first part, and the complainant, *Joseph Dilley*, of the second part, dated the 24th October 1842, it is, among other things, agreed, by and between the said parties, in the words following, to wit: that the said *J. W.* and *C. W. K.*, for and in consideration of the premises, and for and in consideration of the sum of five dollars, in hand paid, to the said *J. W.* and *C. W. K.*, the receipt whereof is hereby acknowledged, have bargained and sold, covenanted and agreed, to and with the said *J. D.*, his heirs and assigns, as follows, that is to say: the said *J. W.* and *C. W. K.*, shall continue to work the said steam saw mill,

Dilley vs. Shipley, et al.—1846.

under the control of the said *C. W. K.*, and the said *J. D.*, jointly; and the lumber, when cut, shall be delivered to the said *J. D.*, at the mills; and shall be the property, and in possession of the said *J. D.*, as soon as the same shall be cut and felled upon the said premises, for the uses and purposes hereinafter mentioned. And the said *J. D.*, by and with the advice and management of the said *C. W. K.*, shall transport and convey the said lumber to market to *Cumberland*, or any other place where they, the said *J. D.* and *C. W.*, may think it advisable to convey the said lumber. And the said *J. D.* shall sell the said lumber, and from the proceeds thereof shall, first, indemnify himself for and against certain liabilities, which he is under in consequence of having superseded certain judgments, particularly described and set forth in a deed of mortgage from *G. H. K.* to the said *J. D.*, bearing date the 25th April 1842. This defendant further answering, states, that among the liabilities in said deed of mortgage, referred to in said articles of agreement, are these same judgments of supersedeas, in favor of this defendant, and not other and different judgments. This defendant further states, that he has been credibly informed and believes, that the said *J. D.*, by virtue and in pursuance of the contract in the said articles of agreement contained, went on and cut down a large quantity of timber, and sawed the same into lumber, which he brought to market, and made sale thereof, or a part thereof; and that the proceeds of such sales were more than sufficient to pay off and satisfy the judgments above referred to. This defendant is advised, that the complainant *J. D.* is estopped, both at law and in equity, from averring, against the validity of said judgments of supersedeas.

This defendant, with his answer, filed the mortgage and articles of agreement referred to therein, but the proof showed that *Dilley* was not indemnified, under either, for his suretyship on account of *G. W. K.* and *Co.* to the defendant *F. S.*, and their other creditors, who were also mentioned in the mortgage.

The answer of *L. D. Beall* admitted, that he was proceeding to enforce the judgments by execution then in his hands.

Dilley vs. Shipley, et al.—1846.

The answer of *S. A. Leckey*, stated, that the said *D.* and *B.* came before him, and informed him, that they wished to become superseders in said judgments; and at their request, he made the entry on his docket in the usual and customary manner, and as set forth in complainants' exhibits; that said complainants had knowledge of said entry so made, and did not object to the same. This defendant believes, that at the time the complainants became such superseders, that it was understood that the name of *B.* was only used to comply with what was thought to be the law in relation to supersedeas, to wit, that two persons were required; and that it was not intended, as between *D.* and *B.*, that *B.* should be at all liable, but it was distinctly understood, that *D.* intended that he should be liable, as he *D.* had received from *G. H. K.*, a bill of sale of certain property, therein mentioned, and which bill of sale or mortgage was executed before said *D.* would agree to supersede the two judgments in favor of *S.*, and others, particularly mentioned in said deed of mortgage.

On the 10th June 1844, the cause standing ready for hearing, on the motion to dissolve the injunction, the county court, (*BUCHANAN* and *MARSHALL*, A. J.,) ordered the injunction, as to the complainant, *Dilley*, to be dissolved, but as to *Bedford*, to be made perpetual.

From this order *Joseph Dilley* appealed to this court.

The act of 1825, ch. 223, sec. 2, directs the justice of the peace to repeat the form of a supersedeas to the defendant and his securities, and that he shall enter the same in his docket, and also endorse on the judgment:—"Superseded by ——— this ——— day of ——— for ——— months."

The cause was argued before *ARCHER*, C. J., *DORSEY*, *CHAMBERS*, *SPENCE*, and *MARTIN*, J.

By *McKAIG* for the appellant.

By *PEARRE* and *PRICE* for the appellees.

DORSEY, J., delivered the following dissenting opinion, in which *SPENCE*, J., united.

Dilley vs. Shipley, *et al.*—1846.

That the grounds of my dissent from the opinion of the court may not be misunderstood, I proceed briefly to state them.

I hold it to be a clear principle of chancery jurisdiction, that before a court of chancery will, by way of injunction, interpose its authority to prevent the execution of judicial process, issuing from a court of law, of competent jurisdiction, it must be made to appear, that the service of such process is against equity and conscience; or that it would exact from the party complainant, the performance of that, which it would be inequitable and unconscionable to demand of him.

Was such the nature and effect of the process issued in this cause, to stay which the injunction was granted, and which has been made perpetual by the decree of a majority of this court, is, I humbly conceive, the question that must determine the appellant's right to the injunction he obtained?

It is an undeniable fact, patent as well upon the face of the bill, as upon the answer and proofs in the cause, that the only objection to the supersedeas judgments, the only ground upon which their execution could be staid, was the mistake of the magistrate, in not stating the date when the judgments were confessed before him. Every other requisition, to the validity of the judgments confessed, was fully complied with. No pretence that every thing was not done on the part of the appellant, which the law required, to give efficacy to the judgments. Not even an intimation that he has been prejudiced or injured, by this mistake of the justice of the peace, or that the appellant's responsibilities have been increased thereby; or that payment of the judgments is about to be enforced against him, before the expiration of the stay of execution, to which he would have been entitled, had the magistrate, in taking the supersedeas, in all things performed his duty. There was not the semblance of any such ground for equitable relief, disclosed in the appellant's case. Every principle of equity, justice, and conscience, called upon him to do that, which the process of execution, complained of, was designed to enforce.

Is it, then, consistent with the principles of equity jurisprudence, that a court of equity, of conscience, should, by its writ

Dilley vs. Shipley, et al.—1846.

of injunction, arrest the arm of the law, when exacting the performance of such a duty ?

It should be remembered, that a writ of injunction in aid or protection of legal rights, does not issue as a matter of course, *ex debito justitiæ*; but that it is a high prerogative writ, resting in the sound discretion of a court of chancery; to be issued, only, in obedience to the dictates of public policy, or of equity and conscience. In aid or protection of legal rights, it never issues, unless at the promptings of public policy, or equity and conscience. The appellant can invoke no such friendly influence in support of his application.

I therefore think, that the injunction, in this case, issued improvidently; and that the order of the county court dissolving it, ought to be affirmed.

Instead of granting an injunction to the appellant, to restrain proceedings at law, on the judgments, against him, a court of equity ought to have listened, with a willing ear, to an application from the appellee, for an injunction to restrain the appellant from setting up at law, this mistake of the magistrate, as a defence against the execution of the judgments.

The views I have taken of this case, renders it unnecessary for me to examine various questions discussed in the argument, and, especially, whether the appellant had any standing in equity; on the ground that adequate relief could have been obtained by him at law, on a motion, before the magistrate by whom they were issued, to supersede the executions; or by a motion to quash them, upon their return.

By the COURT :—

The order of the county court is reversed, as to the appellant; and the injunction made perpetual, with costs, in his favor.

DECREE REVERSED WITH COSTS.

Compton vs. Barnes, et al.—1846.

WILSON COMPTON, GUARDIAN OF BARNES COMPTON, vs.
RICHARD BARNES AND ROBERT FERGUSSON, EXECUTORS
OF JOHN BARNES.—*June 1846.*

After probate of a will, and grant of letters testamentary, it is the duty of executors to appear to, and defend a caveat to the will, under which they are acting, and make all necessary preparations for its trial, upon its merits.

The employment of counsel for such purposes, is incidental to their duty; and it would be unjust not to allow to such executors, out of the estate of the deceased, the expenses necessarily incurred by them in the discharge of their duty.

The devisee of personal property in a will, has a right to call upon the orphans court, to determine upon the legality of an order of court, to employ counsel, and the reasonableness of the allowance to them under such an order.

The counsel fee paid by a caveator of a will admitted to probate, is evidence of the reasonableness of a similar fee allowed to the executor, for the caveatee's counsel, to maintain it.

APPEAL from the Orphans court of *Charles* county.

On the 5th January 1844, *John Barnes* made his last will, and devised to his grandson, *Barnes Compton*, in fee, all that part of his estate called, &c., and all the residue of his estate, (except two manumitted negroes, and \$500 per annum to his nephew, *W. C. Barnes*, for ten years, for life,) with remainder over to his nephews, and certain other of his grandchildren, absolutely. This will was admitted to probate a few days after its execution.

On the 21st December, 1844, the appellant filed a petition, suggesting, that the testator at the time of making his will, was incapable of making a valid will and testament, &c. praying that it might be decreed void.

Afterwards, the appellant petitioned the orphans court for leave to employ counsel, to maintain his caveat; and that court gave leave, to employ such counsel as the appellant might deem proper, and that he be authorised to pay to two counsel, one hundred dollars each; and if the will was defeated, the court would give a liberal compensation.

Compton vs. Barnes, et al.—1846.

In the year 1845, the orphans court ordered that the sum of \$150, in addition to what had already been authorized to be allowed to the appellant, for the purpose of employing counsel to prosecute the caveat aforesaid.

In the month of August, 1845, the executors of the deceased, the appellees, petitioned the court for an allowance to counsel, to maintain the will in opposition to the caveat, and an allowance of \$350 was awarded.

From this order an appeal was taken.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By CRAIN, for the appellant.

By JOHN JOHNSON, for the appellees.

DORSEY, J., delivered the opinion of this court.

The last will and testament of *John Barnes*, the testator, having been admitted to probate, nearly twelve months afterwards *Wilson Compton*, the guardian of *Barnes Compton*, the grandson of the deceased, filed a caveat to vacate the will; and on a petition filed for that purpose, obtained an order from the orphans court of *Charles* county, authorising the guardian to employ counsel to prosecute the caveat; and as a compensation for the professional services thus obtained, to pay the sum of three hundred and fifty dollars. The appellees, the executors, having appeared to the caveat, applied to the orphans court to make an allowance for the employment of counsel to resist the caveat. Whereupon the court passed an order, making the same allowance to the counsel to be employed in opposing the caveat, that had been allowed to the counsel to be retained in its support; and directed the payment thereof, out of the estate of the testator. From this order the present appeal has been taken. And in support of it, on behalf of the appellant, it has been urged, that should the will, on the successful prosecution of this caveat, be vacated and annulled, *Barnes Compton*, as the heir and next of kin of the testator, will become entitled to the whole of his real and personal

Compton vs. Barnes, *et al.*—1846.

estate; and that the order of the court appealed from, is an appropriation of a portion of his estate, for the employment of counsel to defeat his estate. If the will had not been admitted to probate, and letters testamentary not granted thereon, the ground urged in opposition to the order might be entitled to grave consideration. But after the probate of the will, and the granting of letters testamentary to the executors, it was their bounden duty to appear to the caveat, and in the defence to make all necessary preparations for its trial, upon its merits. The employment of counsel for that purpose, follows as a necessary incident to the unquestioned powers and duties of the executors; and it would be inconsistent with every principle of reason, law, and justice, not to allow to the executors out of the estate of the deceased, the expenses by them necessarily incurred in the faithful discharge of their duties.

If the right of appeal, in this case, be asserted, solely on the ground of the injury inflicted on the rights and interests of the appellants, as the heir and next of kin of the deceased, he has no standing in this court, and his appeal should be dismissed. It not appearing by the record that the caveat has been ruled good, the appellant has shewn no prejudice to his interests by the order appealed from; and consequently, on that ground would be incompetent to the prosecution of the present appeal. But the appellant being, by the will, a devisee for life of the estate of the deceased, has, in virtue thereof, a right to call upon this court to determine the legality of the order, and the reasonableness of the allowance to be paid to counsel, sustaining the will. The legality of the order, this court have already sanctioned, and in the absence of all proof, shewing a disparity between the value of the services of counsel opposing, and of counsel supporting, the caveat, we think it would come with an ill grace from appellant, to say that the allowance made to the appellees counsel, has been excessive; when, at the same time, he obtained from the orphans court the same allowance to the counsel employed by him, in sustaining the caveat.

The order of the orphans court, appealed from, is affirmed, with costs.

ORDER AFFIRMED, WITH COSTS.

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

GEORGE McCULLOUGH vs. THE ANNAPOLIS AND ELKRIDGE
RAILROAD COMPANY.—*June 1846.*

By the act of 1841, chap. 168, the *Annapolis & Elkridge Railroad Co.* were authorised to issue bonds, to an amount not exceeding, &c., in the names of the creditors of that company, as payees. A special fund was designated in the act for the payment of interest, the principal being irredeemable for thirty years. Another section of the act referred the claims of *P.* to the arbitrament of *L.*, and any amount so found due him, should be paid in like manner as the claims of other creditors, “and not otherwise.” **HELD**: that the creditors for whom provision is made, as aforesaid, were to be creditors of the company at that time; and the fund thereby created, is for the payment of those claims, and none others. All the, then, creditors have an interest in it; and of which they couldnot be deprived by the board of directors of the company, without their consent. To entitle *P.* to an interest in this fund, he must submit his claim to the award of *L.*, which is conclusive, and so of his assigns. The proof of such submission is upon him, and the directors of the company could not authorise their president to issue a bond to the assignee of *P.*, payable out of the fund created by that act, unless *P.*’s claim had been first ascertained by *L.* And where the legislature, by a subsequent act, (1843, chap. 188,) submitted the claim of *P.* to other arbitrators, to proceed *de novo*, disregarding the act of 1841, and directed the company to issue the bonds mentioned in the *first* act, to such additional amount as would be sufficient to pay the *second award*. It was further *held*, that the creditors of the company, or such of them as had agreed to the law of 1841, and their claims ascertained by the company, have an interest in the fund, and without their consent, no part of it could be applied to the payment of any debt for which the act of 1841 did not provide.

Until creditors to whom bonds were issued under the act of 1841, are satisfied, the fund provided by that act belongs to them, and cannot be taken from them.

Under the charter of the *Annapolis and Elkridge Railroad Company*, (1836, chap. 298,) many of the provisions of which are borrowed from that of the *Baltimore & Ohio Railroad Company*, the directors thereof cannot, by resolution or by-law, deny either to the president of the company or the directors appointed by the State, the same right to vote upon the various questions to be decided by the president and directors, as those who are elected by the stockholders possess.

The president of that company, therefore, cannot by resolution have his right to vote restrained to the mere right of giving a casting vote in case of a tie.

APPEAL from *Anne Arundel* county court.

On the 21st April 1846, the appellant filed his petition, alleging, that heretofore, on or about the 14th February 1846,

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

the *Annapolis and Elkridge Railroad Company*, by their resolution duly passed, authorised and directed the president of the said company to issue to *Passmore McCullough*, or to his order, or to his assignees, if it should appear that any assignment had been made prior to the said resolution, certain bonds which the said company were authorised to issue under an act of the General Assembly of 1841, ch. 168, to the amount of \$4227.96, after deducting from said amount whatever interest might be due on the several claims of *Robert Welch, of Ben.*, for which bonds were, on the said day, directed to be issued to the said *Welch*, provided that before the said bonds should be issued to the said *McCullough*, he should file with the president of the said company a written obligation, to be approved by the counsel of the said company, discharging the said company of any indebtedness to him on any account whatever. That the said *Passmore McCullough* had, previously to the passing of the said resolutions, assigned to your petitioner of his claim upon the said company to the extent of \$3116.39; and afterwards, that is to say in the month of March in the said year, the said *Passmore McCullough* presented to the said president, and offered to file with him his release to the company, duly approved by *Thomas S. Alexander, Esq.*, counsel of the said company, wherein he discharged and exonerated the said company from all claims which he had against them, which was duly executed under his seal, and thereby authorised and required the said president to issue to your petitioner bonds directed to be issued under said resolution, to the extent of the sum of \$3116.39, all which will more fully appear by a reference to the said release, herewith filed and marked exhibit A. That on the day on which the said *Passmore* offered to file with the said president his said release, your petitioner, by his counsel, demanded the issue of the said bonds, according to the said resolution, which the said president positively and peremptorily declined and refused to do, alleging, that the said resolution was not properly passed, because he, as president, had not been permitted to vote at the meeting of the president and directors of the said company, at which the said resolution was passed; whereas your petitioner avers, that the majority of

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

the said directors had determined that the said president had no right to vote in the said matter, under an existing by-law of the said company, which prevented his so doing, and that whether he had or had not voted, and the reason of his not voting could not and did not in anywise concern your petitioner, or affect his right to the said bonds as aforesaid, directed by the said resolution to be issued as aforesaid. That at the time of the passing of the said resolution, and ever since, up to the present time, *James Iglehart*, of the city of *Annapolis*, was and still is, president of the said company, and that as such, the said *James Iglehart* has refused, as aforesaid, to issue the said bonds above demanded by your petitioner, as aforesaid, and that by means of his said refusal to issue the said bonds, your petitioner has suffered great injustice and is without remedy, except by the interposition of your honors by the State's writ of *Mandamus*. And he therefore humbly prays, that the State's writ of *Mandamus*, may be issued by your honors, to be directed to the said *James Iglehart*, president of the *Annapolis and Elkridge Railroad Company*, commanding him, without any further delay and all excuses set apart, to issue to your petitioner and in his favor, bonds to the extent of \$3116.39, as authorised and directed by the said resolution; and the said *George McCullough* further shews, that it was the duty of the said *James Iglehart*, as president of the said company, to issue and put the corporate seal of the company to the said bonds, and in proof thereof and of the passage of the said resolution, herewith files as part of his petition, exhibits B and C.

This petition was verified by the oath of the petitioner.

Exhibit A.—Whereas by a resolution of the board of directors of the *Annapolis and Elkridge Railroad Company*, passed on the 14th day of February 1846, the president is directed to issue bonds to *Passmore McCullough*, or to his order, or to his assignees, authorised under the act of 1841, ch. 168, to the amount of \$4427.96; and it is further provided, that before the said bonds shall be issued as aforesaid, the said *McCullough* shall file with the president of the company a written obligation, to be approved by the counsel of the company, discharging the company of any indebtedness to him on

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

any account whatever ; and whereas the said president is about to issue bonds, as aforesaid, to *James Murray*, of the city of *Annapolis*, to the amount of \$519.79, and to *George McCullough* to the amount of \$3116.39, amounting in the aggregate to the aforesaid sum of \$4427.96, after deducting from said last amount the sum of \$282.78, for interest due on the claims of *Robert Welch, of Ben.* Now this obligation witnesseth, that the said *Passmore McCullough*, in consideration of the delivery of the said bonds to the said *James Murray, William Schley* and *George McCullough*, and concurrently with the execution of these presents, doth hereby release, acquit, exonerate and discharge the *Annapolis and Elkridge Railroad Company* from all claims and demands whatsoever, which the said *Passmore McCullough* hath or ever had, or might have at any time, against the said *Annapolis and Elkridge Railroad Company*, founded on or arising out of any dealings or transactions which has ever been had between the said company and the said *McCullough*. In witness whereof, the said *Passmore McCullough* hath hereunto set his hand and affixed his seal, on this 24th day of February, in the year 1846.

PASSMORE McCULLOUGH, (Seal.)

Signed, sealed and delivered in the presence of *H. McCullough*.

Upon which said exhibit was thus endorsed, to wit :

“The resolution within recited, refers to nothing more than the form of the release to be given by *Mr. McCullough*, for my approval ; I think the within is in form right.

Feb’y 24th 1846.

TH. S. ALEXANDER.”

Exhibit B.—At a meeting of the president and directors of the *Annapolis and Elkridge Railroad Company*, held on Saturday, the 14th February 1846. Present, *James Iglehart, Esq.*, president, *Nicholas Brewer, George Wells, George McNeir, William Bryan, James H. Iglehart, Joseph H. Nicholson, Dennis Claude, William T. Wootton, Stevens Gambrill*, directors.

Among other, were the following proceedings, to wit :

The board proceeded to the consideration of the report of the committee upon the memorial of *Passmore McCullough*,

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

asking the issue of bonds under an award of arbitrators, when *Col. Wootton* submitted the following resolution :

Resolved, That the president of this company issue bonds to *Passmore McCullough*, or to his order, or to his assigns, (if it shall appear that any assignment of his claim against this company, has been made previous to the passage of this resolution,) authorised under the act of 1842, ch. —, to the amount of \$4427.96, after deducting from said amount whatever interest may be due on the several claims of *R. Welch, of Ben.*, for which bonds were this day directed to be issued ; *provided*, that before said bonds shall be issued as aforesaid, the said *McCullough* shall file with the president of this company, a written obligation, to be approved by the counsel of the company, discharging the company of any indebtedness to him on any account whatever, which was read, when *Judge Brewer* offered the following as an amendment, to commence after the word assigned : “or to such person as the attorney shall determine to be entitled to receive said bonds.”

The president here insisted upon his right to vote, and that he should, if permitted, vote for the amendment, but a majority of the directors refused to permit his vote to be taken, and the question was then taken by yeas and nays, as follows :

Affirmative.—*Messrs. Brewer, Wells, James H. Iglehart, Claude*, 4. Negative.—*Messrs. McNeir, Bryan, Nicholson, Wootton, Gambrill*, 5. Determined in the negative, the vote of the president not being counted, and the amendment rejected.

The question then recurred upon the original resolution—the president again insisted upon his right to vote, and declared that if permitted, should vote against the resolution—but his vote being again rejected by a majority of the directors, and the yeas and nays being taken, appear as follows :

Affirmative.—*Messrs. McNeir, Bryan, Nicholson, Wootton, Gambrill*, 5. Negative.—*Messrs. Brewer, Wells, James H. Iglehart, Claude*, 4. Determined in the affirmative, the vote of the president being excluded, and the resolution adopted.

True extract from record of proceedings.

N. H. GREEN, Sect'y.

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

Exhibit C.—Extract from the by-laws of the *Annapolis and Elkridge Railroad Company*.

It shall be the duty of the president to exercise a vigilant supervision over all the operations of the company, he shall conduct the general correspondence of the company, shall attend to the titles of its real estate, and do all the business of attorney of the company, shall sign all certificates of stock when issued, shall carry into effect all such orders as the board shall direct, shall preside at the meetings of the board, and give the casting vote where there is a tie, shall submit for the consideration of the board such subjects as in his opinion will promote the interest of the company, shall cause minutes of the proceedings of the board to be carefully kept and plainly recorded, in case of the absence of the president, his place may be supplied by a president *pro tem.*, by such director as he under his hand shall appoint, and in future to make such appointment by the board.

Five directors and the president shall be necessary on all occasions to constitute a quorum for business, and a majority of the votes present shall be necessary to decide any question affirmatively, questions may be decided by yeas and nays when required by any member, a motion to adjourn shall be always in order, and a motion to postpone shall take precedence of all others, except that to adjourn.

True extracts from record of proceedings.

N. H. GREEN, Sect'y.

Memorandum. The last paragraph of the foregoing petition, commencing with the words "and the said *George McCullough*," was inserted as an amendment to the same, on the motion of the said *George McCullough*, by his attorneys aforesaid, and by leave of the court here first had and obtained, on the day of the hearing of the said petition, being the 25th day of the said month; and at the same time, the exhibits B and C, therein set forth, were filed as part of said amendment.

The county court dismissed the petition, with costs, and the petitioner prosecuted this appeal.

By the act of 1841, chap. 168, it was enacted, that the *A. & E. R. Co.*, be authorised to issue their bonds to an amount not

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

exceeding \$80,000, in the names of the creditors of the company, as payees, for their respective claims against the company, to be ascertained by the *president and directors* thereof, with the exception of the claims thereafter referred to, irredeemable, except at the pleasure of the company or of the *State*, until after the expiration of thirty years: and the *faith of the company* was pledged for the ultimate payment. The bonds to be received by creditors, in full satisfaction of the claims of creditors against the company.

By the 2nd sec., the interest on those bonds was payable *exclusively* out of the net profits of the company, and the profits which the State may derive from the use of the railroad in connection with the *Washington* branch of the *B. & O. Railroad*, to the extent of seven-fifteenth parts.

The 5th sec. declared, that the claims preferred by *Passmore McCullough, &c.*, against the *A. & E. Co.*, should be submitted to the arbitrament of *J. C. Le Grand*, whose award shall be final; and if the arbitrator shall award any thing to be due, the amount thereof shall be certified to *A. & E. Co.*, who shall thereupon execute and deliver to him a bond for the amount so awarded, and payable, principal and interest, as aforesaid, and in no other way; and secured, &c.

By the act of 1843, chap. 188, the claims of *P. McC.*, were submitted to the arbitrament of *J. W.* and *J. G.*, with power to call in an umpire, the award of any two to be conclusive: the arbitrators were to proceed *de novo*, disregarding the award made under the act of 1841, chap. 168, charging him with any sum, &c., *P. McC.* had received under that award.

The 3rd sec. enacted, that “the company be, and they are hereby authorised and directed, to issue their bonds authorised by the above mentioned act, (1841, 168,) *to such an additional amount as may be requisite and sufficient* to pay the amount which may be found due, under the provisions of this act, to the said *P. McC.*, which he is to receive at par, in satisfaction for any sum found due him.”

By the act to incorporate the *Annapolis and Elkridge Railroad Company*, (1836, chap. 298,) it is enacted, that “the election and continuing the succession of the president and

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

directors; the mode of voting and filling vacancies;”—the powers of the president and directors, with the mode of their qualification, shall be the same as is described in the 3rd, 4th, 6th, 7th, 8th, 9th, 10th, 12th and 13th sections of the act to incorporate the *Baltimore and Ohio Railroad Company*.”

It also enacted, that “on a subscription being made on behalf of the State, the governor and council shall have power to appoint annually one director.”

And by the 5th sec., that “the *president and directors* of the company shall be invested with all the rights and powers necessary to the construction and repair of a railroad from the city of *Annapolis* to, &c., with as many sets of tracks as the said president and directors, or a majority of them, may think necessary.”

The 6th sec. of act of 1826, chap. 123, authorised the stockholders of the *B. & O. Railroad Co.* to elect, by ballot, twelve directors, and these twelve directors, or a majority of them, shall have power of electing a president of the company, either from amongst the directors or others.

The 12th sec. enacted, “that the said president and directors, or a majority of them, may appoint all such officers, &c., and to determine by their by-laws the manner of adjusting and settling all accounts.”

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By McLEAN and W. SCHLEY for the appellant, and
By T. S. ALEXANDER for the appellees.

MAGRUDER, J., delivered the opinion of this court.

The appellant applied by petition to the judges of *Anne Arundel* county court for a writ of *Mandamus*, to be directed to *James Iglehart*, as president of the *Annapolis and Elkridge Railroad Company*, requiring him to execute a bond to the petitioner. This application seems to have been grounded upon a resolution of the board of directors, directing the president of the company to issue bonds to *Passmore McCullough*, or to his order, or to his assignees, if it should appear that any

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

assignment of his claim against this company had been made previous to the passage of this resolution, authorised under the act of 1842, chap. —, to the amount of \$4427.96, after deducting from said amount whatever interest may be due on the several claims of *R. Welch*, of *Benj.*, for which bonds are, this day, directed to be issued, with a proviso, that before the bonds are issued, he shall file with the president a written obligation, discharging the company from any indebtedness to him on any account whatsoever.

How much is due to *Passmore McCullough*, after making these deductions, does not appear in the record. But the petition of the appellant states, that of this sum the said *Passmore* had assigned to the petitioner \$3116.39, previously to the passage of the resolution.

He applied to the president, and offered to file with him the release required. Thereupon the petitioner, by his counsel, demanded the issue of said bonds, according to the resolution, which he, (the president,) peremptorily refused to do. He insists that he is entitled to the bonds, and prays that a *Mandamus* may be issued, requiring him to execute them.

No such act as that alluded to in the resolution is to be found, but in the release which *Passmore McCullough* executed, and which accompanies his petition, reference is made to the act of 1841, chap. 168; and certainly there is nothing in that act of Assembly which authorises those proceedings. By a reference to that law it will be found, that the amount of the claim of this individual, if he had any against the company, was to be ascertained by *John C. Le Grand, Esq.*, and that neither the board of directors, nor the president and board of directors, had any authority to issue bonds to him for any amount, not authorised by that gentleman; unless this sum was awarded by *Mr. Le Grand*, the president of the board could not be bound, in obedience to the resolution, to issue the bonds, as the board of directors was not authorised to issue them, until the amount was certified to them by the arbitrator.

All claims against the company then existing, with the exception of those of *McCullough* and another, are to be ascertained by the president and directors of the company,

but with the adjustment of the claims of those individuals, the company is not charged.

It is obvious, that the creditors for whom provision is made by the act of Assembly, were to be creditors of the company at that time, and the fund thereby created, is a fund for the payment of those claims, and none others. It is a fund in which all the, then, creditors may have an interest, and of which they could not be deprived by the board of directors, without their consent. The assignor of the petitioner is a person who may have a claim against the company. To entitle him to any interest in this fund, he must consent to submit his claim to *Mr. Le Grand*, and that his award shall be final and conclusive: (see the Act of Assembly.) To this mode of having his claim finally adjusted, he was not bound to consent; but unless he does consent to it, the act of 1841 makes no provision, whatever, for the payment of any claim which he may have against this company. It does not appear in the record that he did consent to such arbitrament. *Mr. Le Grand* may or may not have awarded, in the premises, No resolution of the board of directors can authorise the president, or any other officer, to issue a bond, (payable out of that fund,) which is not authorised by the law which creates the fund; we certainly cannot infer from that resolution, (even if it was legally passed,) that the sum mentioned in it was the sum, or any part of the sum, ascertained by *Mr. Le Grand* to be due to this person. The language of the resolution would lead to a different conclusion, and besides this, the act of 1841 does not authorise a bond or certificate of debt to be issued to any other than the creditor himself.

We have also been referred to the act of 1843, chap. 180. But the creditors of the company, or such of them as agreed to the law of 1841, and have had the amount of their claims ascertained by the president and directors, have an interest in this fund, and without their consent no part of it must be applied to the payment of any debt for which the act of 1841 does not provide. Now, the claim of *McCullough*, as ascertained by the persons named in the act of 1843, is not one of the claims for which the act of 1841 provides. If the board of

McCullough vs. Annapolis & Elkridge Railroad Co.—1846.

directors can apply any portion of these funds to procure from *McCullough* a release of all his claims, it might next attempt to pay debts since contracted, out of the same fund. Until the creditors, to whom bonds were issued in virtue of the act of 1841, are satisfied, these funds belong to them, and cannot be taken from them. But it nowhere appears that the resolution is grounded upon any award, given in virtue of the act of 1843.

But it is said, that the president of the company, (*Mr. Iglehart*,) when the application was made to him for the bonds, assigned no reason for refusing to issue them, save this, that he was not allowed by the board to vote on the occasion; and the appellant has furnished us with a copy of the proceedings of the board, whereby it appears, that the directors excluded the president from voting, and thereby obtained a majority in favor of the resolution. These doings, it is insisted, are authorised by the charter of this company, and we are referred to a clause in the charter of the *Baltimore & Ohio Railroad Company*, (made a part of this charter,) which says, that the stockholders shall elect a certain number of directors, “to manage the affairs of said company.” To be sure, if this was the only section at which we are to look, in order to decide whether others have not a right to vote with the directors appointed by the stockholders, we might conclude, that the president of the board was not allowed a vote; but for the same reason we should be obliged to deprive of their votes the directors, which, by another clause, are to be appointed by the State. When, however, we examine the different clauses which define the duties of the president and directors, what duties the president and directors, (they, “or a majority of them,”) are to perform, we feel justified in concluding, that the president and the directors appointed by the State, have the same right to vote upon the various questions which are to be decided by the president and directors, as those who are elected by the stockholders.

If then the resolution was such an one as might be passed, the president had a right to vote, and being deprived of his vote, he was not bound to issue the bonds.

ORDER OF THE COURT BELOW AFFIRMED.

Hanson vs. Hanson.—1846.

JOHN JOSIAS HANSON vs. SAMUEL P. M. HANSON AND
OTHERS.—*June 1846.*

H. devised an estate in land to his wife and daughters, for life, with remainder in fee to his son *S.*; and in the next clause of his will, gave to his son *J.* a sum of money, to be paid to him by *S.* in five annual instalments, "the first payment to be made at the end of the first year after he gets possession of the plantation." The devisees for life having died, some of the heirs at law of *S.*, and the heirs of *J.*, filed a bill, praying a sale of the land, and the proceeds thereof to be distributed among the parties severally entitled thereto. **HELD:** that the legacy when due, was payable to the executors, or administrators, of *J.*, and the bill must be filed by them.

The bill could not be filed until the first payment was due, viz., the end of the first year after the devisee in fee got possession.

It would be no defence to such a bill to object, that before a sale can be made, the estate should be divided among the heirs of the devisor; or if incapable of division, that the heir entitled should have a right to elect.

APPEAL from the Equity side of *Charles* county court.

On the 14th March 1843, *S. P. M. Hanson, P. D. G. Hedgeman*, next friend of *Samuel Adams*, a minor, *William H. Brawner*, next friend of his minor children, &c., filed their bill, alleging, that *Samuel Hanson, Sen.*, died sometime in the year 1817, having first executed his last will and testament, by which the said *Samuel Hanson, Sen.*, devised to his two daughters, *Margaret Beall* and *Charity Hanson*, for and during their natural lives, a certain tract or parcel of land lying in *Charles* county, called and known by the name of "*Hanson Hill*;" and after the death of said *Margaret Beall* and *Charity Hanson*, the said devisor devised said real estate to his son, *Dr. Samuel Hanson*, charging the said real estate with the payment of \$1250. by his son, *Dr. Samuel Hanson*, to his son, *John Hanson*; that *Dr. Samuel Hanson* died, leaving the following heirs and representatives, to wit: *Samuel, Thomas M., William, John Josias, Eliza*, who had intermarried with a certain *Francis Adams, Charlotte* and *Maria*. *Samuel* has died, leaving as his heirs and representatives, one of your complainants, *Samuel Hanson*, and *Mary*, who intermarried with your complainant, *Wm. H. Brawner*, and is now dead, leaving two children, both minors, to wit: *John James* and *Mary E. C. Brawner*; *Eliza* has died, leaving

Hanson vs. Hanson.—1846.

one child, to wit: *Samuel Adams*, a minor. The remainder of the children of *Dr. Samuel Hanson*, heretofore named, are yet alive, and all of lawful age; that *John B. Hanson* died intestate, leaving the following heirs and representatives, to wit: *Elizabeth*, who has intermarried with *Thomas M. Hanson*, *Drucilla P. Hanson*, who has intermarried with *William Hanson*, and *Samuel P. M. Hanson*, one of your complainants, all of lawful age. That since the deaths of said *Dr. Samuel Hanson* and the said *John Hanson*, the two devisees for life, (to wit: *Margaret Beall* and *Charity Hanson*,) of said real estate, called "*Hanson Hill*," have both died, the last named, to wit: *Charity Hanson*, sometime during the year 1842. Prayer, for a decree for the sale of said real estate, the proceeds arising therefrom to be distributed among the parties severally entitled thereto; and that your honors will order *subpœnas* to issue, commanding said *Thomas M. Hanson*, *William Hanson*, &c., and for other and further relief.

With this bill the complainants exhibited the will of *Samuel Hanson, Sen.*, dated 29th September 1817, which contained, among others, the following clauses:

"I leave and bequeath to my dear and well beloved wife, *Sarah Hanson*, and my two daughters, *Margaret B. Beall* and *Charity F. N. Hanson*, the use of my dwelling plantation, for and during the term they may remain unmarried."

"*Item*.—I leave and bequeath unto my son, *Samuel Hanson*, and his heirs and assigns, forever, my dwelling plantation, after the death or marriage of my said wife and daughters; also my watch."

"*Item*.—I leave and bequeath unto my son, *John B. Hanson*, \$1250, to be paid him by my son *Samuel* in five annual payments, the first payment to be made at the end of the first year after he gets possession of said plantation."

The will then devised a variety of personal property, slaves, &c., to his wife and children, by name, &c.

"*Item*.—My will and pleasure is, that at the death of my wife, *Sarah Hanson*, all the property which I have bequeathed to her shall be divided equally between my four daughters,

namely, *Margaret B. Beall, Mary Fivall Cawood, E. B. McPherson and Charity F. N. Hanson.*”

“*Item.*—I leave and bequeath unto my three grandsons, *Samuel Hanson, Thomas Marshall Hanson and William Hanson*, one tract or parcel of land lying in *Nanjemony*, binding on the *Potomac*, on which is a herring fishery, called and known by the name of *Going near in fee simple.*”

The defendants, *Thomas M., William, John Josias and Charlotte Hanson, Elizabeth*, the wife of *Thomas M. Hanson, Drucilla P.*, wife of *William Hanson*, answered the bill, the only material part of which is referred to in the opinion of this court, and is therefore not set forth here.

On the 1st November 1844, the county court, (C. DORSEY, A. J.,) decreed a sale of the real estate, in the proceedings mentioned, in the usual form.

From that decree *John Josias Hanson* appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By REEDER for the appellant.

By J. JOHNSON for the appellees.

MAGRUDER, J., delivered the opinion of this court.

Samuel Hanson, senior, by his will, dated 29th September 1817, after devising to his wife and two daughters, for life, the land in the proceedings mentioned, gave the same, in fee, to his son *Samuel*; and in the next clause, gives to his son, *John B. Hanson*, twelve hundred and fifty dollars, to be paid him “by my son *Samuel*, in five annual payments, the first payment to be made at the end of the first year, after he gets possession of the plantation.” The devisees, for life, are dead, and no part of the said legacy being paid, this bill is filed by some of the heirs of *Samuel*, (the devisee in fee,) and heirs of *John B. Hanson*, to whom the twelve hundred and fifty dollars are given, asking for a sale of the land, “and the proceeds arising therefrom to be distributed among the parties severally entitled thereto.” The defendants, in their answer, say, that before a sale can be made, the estate should be divided among the heirs of *Samuel*, or if incapable of division, the heir entitled

McKim and Marriot *vs.* Duncan, *et al.*—1846.

should have a right to elect; and it is insisted, that no one could make payment of the legacy until an election.

If this was the only objection to the relief which was prayed, it would not hinder an affirmance of the decree; but there are objections to any relief being afforded in this case, and the mention of which, will enable the persons entitled to claim the legacy, to proceed correctly, if in order to recover the money given to *John B. Hanson*, it should be necessary to file another bill of complaint. The money, when due, is payable to the executors or administrators of the legatee, and the bill must be filed by them.

Another objection to the decree, which will be noticed, is, that it does not appear, that the first payment which is to be made, was due at the time that this bill of complaint was filed. The first payment was to be made at the end of the first year, after he, (the devisee in fee,) gets possession of said plantation. The bill, filed on the 14th March 1843, alleges, that one of the devisees for life died, "sometime during the year 1842." The defendants, in their answer, insist, that the money is not due till "late next fall; the tenant for life, *Miss Charity Hanson*, not having departed this life till the fall of 1842," and there is no testimony in the case.

For these reasons, if there be none others, the decree must be reversed, with costs, and the bill dismissed.

DECREE REVERSED AND BILL DISMISSED.

DAVID T. MCKIM AND WILLIAM H. MARRIOTT, EXECUTORS OF JOHN MCKIM, JR., *vs.* J. M. DUNCAN, *ET. AL.*—*June 1846.*

A testator by his last will declared, that neither of his executors should be entitled to any commissions for settling his estate, but that all necessary expenses relative to such settlement, should be charged to his estate. The orphans court allowed the executors a commission of six per centum. This was, however, cancelled by consent, and the question of commissions presented to that court *de novo*, when they decreed the executors were not entitled to any such allowance. HELD, upon appeal, that the executors were entitled to the commissions which had been previously allowed them.

McKim and Marriott, vs. Duncan, et al.—1846.

If the acts of Assembly of this State do not expressly grant to the orphans court, power to allow executors commissions in such cases as those mentioned in the testator's will, no commissions can be claimed by them.

The act of 1798, chap. 101, which declares that the commissions of an executor shall be, at the discretion of the court, not under five, nor exceeding ten per centum, on the amount of the inventory or inventories, excluding what is lost or has perished, and prescribes the manner in which the account of an executor must be made out, confers upon the orphans court the power in this, as it does in all other cases, to allow a commission.

A testator cannot take from the orphans court a power which the law gives it.

The will of a testator is to be regarded in the administration of his estate; but this general rule is to be taken with this proviso, that such will be not inconsistent with the law.

The 2nd sec., sub chap. 20, act of 1798, chap. 101, must be read in connexion with the 5th sec., 14th sub. chap. of the same act.

The first clause makes it the duty of the court in all cases to allow commissions to executors. The other makes one exception to that rule.

A testator is not permitted to deprive his executor of a commission of not less than five per centum, by bequeathing him, by way of compensation, any thing which shall appear to the court to be an insufficient compensation.

A person by undertaking the office of executor does not elect, and is not bound to give effect to all the provisions to be found in a will.

A testator cannot by his will prevent his executors from collecting and accounting for debts due his estate; nor can he authorise any other person to receive it from his debtors.

A testator bequeathed to his three sons, to be equally divided between them, the whole of his capital used in his copper business, that may be standing to his credit after the payment of all debts and claims upon, or growing out of, that business. The capital in the copper company was returned by the executors in the schedule of debts due the deceased. **HELD**, that whether the testator was a partner of the firm engaged in the copper business with his sons, or only accommodated that firm, of which he was not a member, with a loan of money, could make no difference; that the money due the testator was a part of his personal estate, payable only to his executors; and when paid, constituted a part of the assets in their hands, to be by them accounted for in their settlements with the orphans court.

A testator bequeathed to his son certain shares of stock theretofore transferred to him by his said son, who was also one of the executors of his father's will. **HELD**, that with the appraised value of such stock the executors must be charged, and it must be regarded as a part of his estate, and not the stock of its former owner, though there was no proof how the testator became the absolute owner.

Upon the last two items the executors were held to be entitled to commissions.

APPEAL from the Orphans Court of *Baltimore* county.

McKim and Marriott, *vs.* Duncan, *et al.*—1846.

On the 15th March 1845, the appellees filed their petition before the said court, alleging, that on the 8th December 1841, *John McKim, Jr.*, made his last will; that he appointed his sons, *D. T.* and *John S.*, and his son-in-law, *W. H. M.*, executors thereof, and therein declared, that no one of his executors should be entitled to any commissions for settling his estate; that the testator died in the month of January 1842; that his son, *John S.*, renounced his appointment, and on 3rd February 1842, letters testamentary were granted to the appellants; that the executors settled three accounts with the said court, and claimed, and were allowed, in their *third* account, commissions to amount of \$9418.57. And in their *fourth* account, \$81.33; that the allowance of commissions to the executors being without notice to the appellees, they agreed to open the same, vacate the decree therefor, and that the subject matter of their claim thereto, might be again considered by the court. The petition then proceeded to set forth the interest of the appellees under the will, and the diminution of their devises by the allowance of commissions to the executors. The petition further alleged, that as to a sum of \$99,025.88, the same never was received into possession by the executors; that the interest of the testator in a copper establishment, was one in property, credits, and effects, which the testator, at the date of his will, and at the time of his decease, held or was entitled to, in partnership with his two sons, *David T.* and *John S.*; that the same was charged to the executors in their *first account*, and in their *second account* the said charge was extinguished, by a credit for the whole amount.—And that the same, when charged in their *third account*, was in the same account credited in discharge; the only effect of the introduction of this item into the said *third account*, being, as respects your petitioners, to diminish the residue of the estate by an allowance of six per cent. commissions thereon; and that as respects the warehouse, charged and credited at \$7000, in said *third account*, and also in respect of the two hundred and sixty-five shares, *Phoenix Shot Tower stock*, charged and credited in said *third account*, at \$15,900;—the only effect of the introduction of these items into said account, was to increase the allow-

McKim and Marriott, vs. Duncan, et al.—1846.

ance of commissions to said executors; that in respect of the sum of \$6000, charged on the dwelling house and property in *Holli-day* street, no commission, in any point of view, ought to be allowed. Prayer, for a settlement of a further account, &c.

The executors answered separately.

David T. McKim's answer claimed commissions, admitted that the question was still open, and among other matters alleged, that with regard to the capital of *John McKim, Jr., & Sons*, credited in the account of the executors, and on which commissions were charged, the same was the entire property of *John McKim, Jr.*, for which he annually was credited with interest. He alleged he would not have taken out letters testamentary, but for the opinion of the judges of the court, expressed before he took them out, that he would be entitled to commissions.

The answer of *W. H. Marriott*, also claimed commissions;—that he believes it was understood by all the representatives, before he took out letters, that commissions were to be allowed the executors; that he refused to undertake it, unless he was to be paid. The passage of the administration accounts, and allowance for commissions were admitted. That as to the item of \$99,025.88, this respondent is advised, that the same is properly made liable to the commissions allowed by the said court, and stated in said accounts, because the same was a debt due to the estate of said testator, by said *David T. McKim*, and his brother, *John S. McKim*, the same having been loaned to them by the testator, who had no interest in the business in which the same was used, and for which it was loaned by him to his said sons not as a partner, but only as a friend and creditor.

With this answer was filed a letter from *J. M. Duncan*, one of the appellants, dated 11th May 1843, to said *Mariott*, which stated :

“ I have not seen *Mr. Handy*, since the time I mentioned to you, that we met on the street; nor have I said to him anything on the subject of executor's fees, either *pro* or *con*. I had supposed that the commissions were to be charged by you, having expressed my opinion, that you were fairly entitled to a

McKim and Marriott, vs. Duncan, et al.—1846.

remuneration for your labor, and believed that a paper had been drawn up and signed by the members of the family, coinciding with that opinion. Have you not such a paper duly signed? My impression was, that you possessed this paper, and therefore I feel surprised by your note, which seems to imply that you have it not."

And also a declaration in writing, signed by said *W. H. M.*, filed in court, setting forth, "that in accepting and qualifying for the execution of said trust, he reserves to himself the right to demand and receive, such commissions as the orphans court of *Baltimore* county may, in its discretion, allow."

The appellees filed a general replication to the answers.

A commission was issued, and there was proof, that *John McKim, Jr.*, was not interested in the copper works, from the year 1839; that he received nothing from that concern after that period, but interest on his capital engaged in it.

A deed of mortgage from *D. T. McKim* to his father *J. McK., Jr.*, dated 1st May 1840, to secure the sum of \$6900, was also filed in the cause.

A variety of accounts, taken from the books of the deceased, with his several children, were also proved.

By the last will and testament of the deceased, dated 8th December 1841, he bequeathed to his three sons, *David T.*, *John S.*, and *Richard*, to be equally divided between them, "the whole of my capital used in the copper business, that may be standing to my credit, after the payment of all debts and claims upon, or growing out of that business;" and also the warehouse, in which that business was carried on.

The testator bequeathed to his son *David*, his dwelling house, "which, however, I charge with the payment of the sum of \$6000, to constitute a part of the residuum of his estate:" his son to pay interest thereon.

He also bequeathed to his said son, two hundred and sixty-five shares of *Phoenix Shot Tower* stock, "heretofore transferred to me as collateral security, by him."

After various other devises to his children, and in trust for his grand-children, he devised a residuum of his estate, created from various specified sources, to amount of \$60,608, in trust,

McKim and Marriott, vs. Duncan, et al.—1846.

for his three daughters, for life, with remainders over; and all the residue of his estate to his six children, share and share alike.

The testator then declared, that neither of his said executors should be entitled to any commissions for settling his said estate, but all necessary expenses relative to such settlement, should be charged to his estate.

By a codicil, dated 10th December 1841, the testator revoked the devise of that portion of his estate, which he had bequeathed to his son *David*; and again devised the same to him in trust, for the sole use of his wife, &c., with power to sell, mortgage, &c., with remainder in trust for such of the child or children of the said *David*, or their descendants, as the said *David* may direct by, &c.

The *Shot Tower* stock was included, and valued in the inventory of the estate, at \$60 per share; as were also all the stocks which the testator devised in trust for his grand-children.

The schedule of sperate and desperate debts, amounted to \$123,117.74; of which *D. T. McK.* was alleged to be chargeable with \$6000. The capital in the copper company, \$99,025.85.

In the *first* account of the executors, they charged themselves—

With an inventory of the personal estate of the deceased, \$44,959.51. This included the *Shot Tower* stock.

With a debt of *D. T. McKim*, for amount due by him to the deceased, \$6000.

With the amount of the deceased's interest in the firm of *John McKim, Jr., & Sons*, as returned in the lists of debts, \$99,025.85.

In their *second* account, they were credited with the item of \$99,025.85, as prematurely, and erroneously brought on; the firm not being, as yet, settled.

In their *third* account, the last item was restored, and the executors were allowed commissions on \$156,976.22, at 6 per cent., \$9418.57. There were allowed, also, a credit of \$15,900, for two hundred and sixty-five shares *Phoenix Shot Tower* stock, which was bequeathed to *David T. McKim*, in trust, &c.

McKim and Marriott, vs. Duncan, et al.—1846.

The executors, from time to time, passed four other accounts.

After the agreement to open the accounts upon the subject of commissions, and that the orphans court might reconsider that subject, *de novo*.

That court, on the 15th March 1845, (KEMP, LEARY, and READEL, J.,) decreed that neither of the executors should be entitled to any commissions, and that the court have no power under the will, to award the same; and that the executors further account, and charge themselves with the commissions credited in the accounts heretofore passed, &c.

From that decree the executors appealed to this court.

It was agreed, that upon *this appeal* the mortgage from *D. T. McK.*, and *J. McK., Jr.*, should not be considered as a ground of claim against him.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By McMAHON and REVERDY JOHNSON for the appellants :

This is an appeal from a decree of the orphans court of *Baltimore* county, by which all commissions were disallowed the executors of *John McKim, Jr.*, deceased.

The facts of the case are as follows :—

The late *John McKim, Jr.*, departed this life, leaving a considerable property, both real and personal. By his last will he appointed his sons, *David* and *John*, and his son-in-law, *Marriott*, his executors, and by that will he directed, that they should charge no commission for settling the estate; but that his estate should pay the necessary expenses. By this will he gives no bequest, whatever, to *Marriott*; and none to *David*, except in trust for his wife and children; but to *John*, a large bequest and devise are made. *John* renounced the executors of the will, and *Marriott* and *David*, after a probate filed with the orphans court, against the clause of the will prohibiting the charge of commission, took out letters testamentary upon said estate;—and before letters granted, the orphans court telling them, that commissions would be allowed, notwithstanding this clause in the will.

McKim and Marriott, vs. Duncan, et al.—1846.

The executors settled three accounts, and the, then, orphans court, allowed them six per cent. commission, for their services in settling up the estate.

After such allowance made, some of the legatees of *John McKim, Jr.*, filed a petition, requiring the court to disallow all commissions; and if the court will not do so, to disallow commissions on certain items in the accounts of the executors. They, the executors, assenting to consider such allowances, as open for the consideration and judgment of the orphans court. One item, was a commission on the interest of the deceased in the copper works, in which *Mr. McKim* permitted his name to be used as a partner, and into which he had put a large capital, without any participation in the profits; and merely obtaining interest on the principal, so lent to such copper works, and which he bequeathed by his will. The legatees of such fund having received the amount of such bequest, gave release therefor.

There are also objections made to other items of credit for commissions.

The present orphans court disallowed every allowance for commissions, and from that judgment this appeal is taken.

The appellants will contend :

1. That the orphans court are authorised and required, under circumstances similar to the present, to allow commissions to executors, although by the will appointing them executors, the testator directs none to be charged.

2. That the various allowances of commissions, as made by the former orphans court, were correct and proper, and that upon the facts and circumstances stated in the case, they ought not to have been disturbed by the present orphans court.

By S. J. K. HANDY and NELSON for the appellees, who insisted :—

- 1st. The authority to make a last will and testament of personal property, and to appoint an executor, is, by the common law of *England*, in force at the time of the settlement of *Maryland*, imported by our ancestors, incorporated into, and made a part of the laws of the State, and is not in virtue of any

McKim and Marriott, vs. Duncan, *et al.*—1846.

act of Assembly; that executors and administrators, at common law are entitled to nothing, by way of compensation or commissions; that each testator, at common law, has the right to debar his executors from receiving commissions, the office of executor being one of private trust named by the testator, and not by the law.

2nd. There is a defect of authority in the several orphans courts, by act of Assembly, to allow commissions to executors against the declared intention of the testator, that his executors shall act without compensation or commissions; that the sound and true construction of the several acts of Assembly will exclude this case, as not within the meaning and intention of the legislature, leaving it to be governed as at common law; that the legislature intended, by the *5th sec., 14th sub. chap.*, of the *Act of 1798, chap. 101*, to embrace the case only, where testators desiring, and intending to compensate, give something by way of compensation, but give, in the opinion of the orphans courts, an insufficient compensation, repealing the law, *pro tanto*, as it existed prior to said act of Assembly:—this case comes not within the letter, nor within the meaning and the intention of said fifth section; nor is it embraced within the meaning and the intention, of the *2nd sec., 10th sub. chap.*, of the *Act of 1798, chap. 101*.

3rd. From the pleadings and the evidence in the cause, it appears, that the executors made no contract or agreement with the residuary legatees of their testator, to entitle them to an allowance of commissions against the prohibition of the will; but on the contrary, the executors took out letters, with the full understanding, that the residuary legatees refused to make any such agreement; that the appellants having voluntarily assumed the trust reposed in them by the testator, are bound to take the office of executor, with the condition imposed by the will, the testator intending, by excluding the allowance of commissions, that what would be allowed as such, without this inhibition, should fall into, and make a part of the residuum of his estate, made liable and charged by the will, to make up any deficiency in the legacies given to his daughters; that the sales of the real estate are inadequate to make up the legacies given

McKim and Marriott, vs. Duncan, et al.—1846.

to his daughters; which makes a resort necessary, under the will, to the residue; and if commissions are allowed, the residue will be much exhausted, and the intention of the testator will be defeated, as respects his daughters; which intention ought to prevail.

4th. The appellants being members of the testator's family, he made them large advances from time to time, incurred responsibilities, and paid debts and liabilities for them, to a large amount; and shortly previous to his death, relinquished and cancelled valid debts due by each of them to him, which would otherwise have made part of the personal estate; the testator nominated and appointed them, the executors of his last will, with the belief, and the full understanding, that they would perform the trust reposed in them by the will, on the terms specified, to which appointment they did not object in his lifetime, although they had knowledge of such appointment, at or about the time of making said will; and more especially, as both executors take beneficially by the will, they are bound by its terms and provisions, and *ex æquo et bono*, are not entitled to claim commissions, they having contracted and agreed to act without commissions, by the acceptance of the office of executors, under and by virtue of the will.

5th. The codicil to this last will and testament, made *two days* after the will, as disclosed by the evidence in the cause, is in the handwriting of *David T. McKim*, one of the executors and legatees, and was signed and attested at the instance, and at the request of said executor and legatee, and it is not competent for said executor and legatee now to set up the defence, that he takes nothing by the will, even if the fact were so, but he is estopped and precluded from objecting to the codicil of said will, and is as much bound to act without commissions as executor, as if the codicil had not been made.

6th. *David T. McKim* waived all claim to commissions anterior to taking out letters testamentary on his father's estate; he also refused to make any agreement to allow commissions to his co-executor, *Wm. H. Marriott*, and therefore, in no aspect of this case, can he rightfully and legally claim the allowance of commissions; and as both executors entered

McKim and Marriott, vs. Duncan, *et al.*—1846.

on the performance of the trust reposed in them by the will, with full knowledge of the opposition to have commissions allowed contrary to the intention of the testator, and of the conditions annexed to the trust, they have no right to complain, and that both executors, under all the circumstances surrounding this case, ought to have no allowance of commissions made them by the orphans court, against the general, and the particular intent of the will.

7th. The claim made by said *David*, independently of his waiver of claim to commissions, is inadmissible, inasmuch as the evidence in the cause offered by the executors, discloses the facts, that he, *David T. McKim*, has elected to take the legacies and benefits given him by his father's will and codicil; and has assumed the trusts, for the grand-children, created by the will, and also the peculiar and special trust created by the codicil, and therefore he is bound to give effect to the whole will, and is not entitled to commissions.

8th. That under no aspect of this case, ought the executors to be allowed commissions on the sum of \$99,025.88, returned by them as a debt due to the separate estate of the testator, by *David T. McKim*, and *John S. McKim*, the surviving partners of *John McKim, Jr., & Sons*, and charged and credited as such, in their *first, second, and third* accounts, because by the death of *Mr. McKim*, the senior partner, the whole partnership property and business, devolved by law on his surviving partners, whose duty it was, as surviving partners, to settle up the said copartnership business; that the appointment of *David*, as one of the executors, he being a copartner, does not entitle him to claim commissions out of the separate estate of his testator, for winding up the copartnership business after his father's death, nor is his co-executor, *Marriott*, entitled to claim commissions on this item; nor ought commissions to be allowed on the sum of \$15,900, the value of two hundred and sixty-five shares of *Phoenix Shot Tower* stock, given and released by the will to *David*, it having been held by the testator as collateral security only, at the time of his death; nor ought any commissions to be allowed on \$6000, a debt charged on the dwelling house devised to *David*, and returned by executors, as a debt due by said *D. T. McKim*, as executor.

McKim and Marriott, vs. Duncan, et al.—1846.

9th. Commissions ought not to be allowed the executors on the sum and item of \$99,025.85, returned by them in their list of debts, as “the amount of capital of late *John McKim, Jr.*, in copper company, due by *David T. McKim* and *John S. McKim*, surviving partners of *John McKim, Jr., & Sons*,” and charged by executors in their first administration account, as “being the amount of deceased’s interest in the firm of *John McKim, Jr., & Sons*, as returned in their lists of debts due the deceased,” and which item and sum of money was extinguished by a credit and allowance in their *second* administration account; the executors alleging in said account, that they had “*prematurely and erroneously* charged themselves with said item in their last account, the firm of *John McKim, Jr., & Sons*, not being settled up;”—and which item was again charged and credited in their *third* account: because the evidence shows, that the executors never reduced said item and sum of money, or any part thereof, into their possession as executors, nor was the same ever paid over to them as executors, by the surviving partners of *John McKim, Jr., & Sons*; but on the contrary, the said business and firm was conducted after the death of *John McKim, Jr.*, by his surviving partners, who wound up the said business and firm, paid the debts of said copartnership, and divided the profits and capital of said copartnership business amongst themselves. And commissions ought not to be allowed on the sum of \$7000, the appraised value of warehouse at the corner of *Frederick* and *Pratt* streets, where the copper business was conducted by *John McKim, Jr., & Sons*.

MAGRUDER, J., delivered the opinion of this court.

The will of the late *John McKim, junior*, gives rise to this controversy, and the first and principal question is, are the persons to whom letters testamentary were granted, and who have administered the assets, entitled to receive any remuneration for the services they have rendered?

It will be assumed in this case, that if our act of Assembly of 1798, ch. 101, does not expressly grant to the orphans court, the power to allow to the executors of *Mr. McKim* a com-

McKim and Marriott, vs. Duncan, *et al.*—1846.

mission for their services, no commission can be claimed by them. But surely a law, which, in prescribing the manner in which the account of an executor must be made out, has these words: "His commission, which shall be, (at the discretion of the court,) not under five per cent., nor exceeding ten per cent., on the amount of the inventory or inventories, excluding what is lost or has perished," confers upon the orphans court the power in this, as it does in all other cases, to allow a commission. The question then is, can the testator take from the court the power which the law gives to it, and which is conferred in language, which makes it their duty to allow not less than five per centum?

The will of *Mr. McKim*, in one of its clauses, appoints *David T. McKim*, *John S. McKim*, and *William H. Marriott*, the executors; and afterwards it is added: "I do hereby declare it as my will and intention, that neither of my said executors shall be entitled to any commissions for settling my estate, but all necessary expenses relative to such settlement, shall be charged to my estate." *John* declined, the others obtained letters testamentary, and now claim the commission. Is the above clause in the will a bar to the claim?

It must be conceded, that the act of Assembly no where gives to a testator the power which this testator attempted to exercise. It is true, that the will of the testator is to be regarded in the administration of his estate, but this general rule is to be taken with this proviso, that such will be not inconsistent with the law. That this provision of the will is inconsistent with the law, must be obvious upon an examination of the act of 1798, especially if the 2nd sect. of sub. chap. 20, be read in connection with the 5th sect. of sub. ch. 14. The first clause makes it the duty of the court, in all cases, to make an allowance; the other makes one single exception, and this case cannot be brought within that exception. To defeat a claim founded upon sub. ch. 20, sect. 2, because of this clause in the will, there must be found a law which gives to the testator a power to repeal the act of 1798, so far as it directs the manner in which the accounts to be passed by his executors are to be made out; a law which directs the commission to be allowed,

McKim and Marriott, vs. Duncan, et al.—1846.

unless the testator shall otherwise direct. The testator is not permitted to deprive his executor of a commission of not less than five per centum, even by bequeathing to him, “by way of compensation,” any thing which shall appear to the court to be insufficient compensation. Surely, if he cannot take from the court its power to allow the executor ten per centum upon the amount of the inventory, by giving to him a less sum than the law authorises the court to allow, and which the court believes to be sufficient, he cannot, by forbidding any allowance whatever to be made, deprive the court of the power which the law says it shall exercise in all cases, with but one exception, and that exception not embracing this case. The court may allow more, although the will gives *eight* per centum, (thus disregarding such a provision in the will.) Surely its power is not to be taken away by a clause of the will, which allows to the executor nothing.

A person, by undertaking the office of executor, does not *elect*, and is not bound to give effect to all the provisions to be found in the will. Such clauses as are inconsistent with the law which the executor is to obey, are of no validity, and constitute no part of the will.

It is not believed, that the record furnishes testimony, that the executors agreed to release any commission to which the law might entitle them. The agreement spoken of might not have been executed, because, after the opinion expressed by the court, or one of its judges, it was not deemed of importance to obtain an agreement, in regard to the executor’s commission, on an estate in which three married ladies were principally interested. Indeed, one of the executors seems to have taken quite unreasonable pains, to let it be distinctly understood by all who are concerned in the estate, that he had a will in regard to the commission, inconsistent with that of the testator, and that the law should settle the question between them.

The opinion of this court then is, that in this case, and notwithstanding the provision of the will, the executors were entitled to the commission which had been previously allowed to them.

McKim and Marriott, vs. Duncan, et al.—1846.

The petition filed by the appellees, besides insisting that no commission was to be allowed to the executors, also charges, that commissions had been improperly allowed upon particular sums of money. Upon these questions, the court below could express no opinion, because, in its judgment, it had no legal power to make any allowance when the will forbids it. Differing in opinion with the court below on this question, it is our duty to direct what shall be the decree in the premises.

The first objection is, to commission allowed on a sum of money returned by the executors as a debt, due the deceased by *David T. McKim* and *John S. McKim*, surviving partners of *John McKim, junior*. It can make no difference, in deciding this question, whether the testator was a partner of the firm, or accommodated that firm, of which he was not a member, with a loan of so much money. The money was unquestionably a part of his personal estate, payable only to the executors, and when paid to them, constituted a part of the assets in their hands to be by them accounted for in their settlements in the orphans court. The testator could not, by his will, prevent the executors from collecting and accounting for this portion of his estate, or authorise any other person to receive it from the debtors.

It can be no objection, to the commission allowed on the appraised value of two hundred and sixty-five shares of *Phoenix shot tower* stock, that it was transferred to testator by one of the executors, "as collateral security." While the executors are charged with the appraised value of this stock, it must be regarded as a part of his estate. It cannot be regarded as the stock of its former owner, although we are not told when or how the testator became the absolute owner of it.

We are of the opinion, then, that the executors were rightfully allowed a commission on these two sums of money.

We are also of opinion, with respect to the \$6000, that they are not assets, upon which a commission is to be allowed by the orphans court.

JUDGMENT REVERSED AND CAUSE REMANDED.

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

JOSEPH H. JONES, ADM'R D. B. N., OF JAMES HAWKINS,
AND ADM'R OF SUSANNA CLAGETT, vs. JOHN C. JONES.—
June 1846.

S. the creditor of *C*, obtained a decree for the sale of real and personal estate, mortgaged by the latter to him; and at the sale thereof became the purchaser. After the sale, *C* agreed to repurchase the property, and applied to *H* to advance him certain bank stock and bonds, on account of which *S* conveyed to *H* four hundred acres of the estate in question, agreeing to receive the stock and bonds as cash; and that the balance of the mortgaged estate should remain subject to a lien, to *H*, for the sum due him beyond \$10,000, the value of four hundred acres of land conveyed to *H*. The debt due from *C* to *S*, was ascertained to be less than *S* originally claimed. Some years afterwards, *S* sold and conveyed his interest in the estate to *J*, for the sum of \$7265.65. By the indenture between *S* and *J*, it was covenanted, that *J*, by his indenture of mortgage upon the said estate, would secure to *S* the payment of one of the aforesaid bonds; and also secure him from the claim of *H* thereon, and which claim was not to be altered or prejudiced by the sale from *S* to *J*; and that *J* was to stand in the place of *S*. Upon a bill filed by the representatives of *H* to enforce his lien, it was decreed, that unless *J* should pay the balance due to *H*, on or before, &c., then the estate should be sold, and out of the proceeds thereof, after payment of the debt of *S* assigned to *J*, the complainant should be paid. The decree also directed an account of rents and profits, &c., to be taken, and after allowing *J* for all just and necessary improvements made by him upon the the said estate after he came into possession, the balance should be applied to the payment of *J*'s claim, as assignee of *S*.

The interest conveyed by *S* to *J*, in equitable contemplation, was but a lien upon the premises for the balance due by *C* to *S*.

An exhibit which consisted of mere pencil marks upon an isolated paper, unexplained by any testimony to show the time or occasion which gave birth to it, as testimony is of too questionable a character to be made the basis on which the rights of the parties litigant in the cause, should be adjusted.

Where the testimony of several witnesses in regard to the amount of rent which ought to be paid, was of such a nature as to require it to be averaged, the aggregate amount ought to be ascertained by adding together the estimate of each and every witness who testified thereto, and dividing the sum thus obtained by the *entire* number of witnesses. Concurring witnesses will each be counted as one.

The rule of averaging the testimony of witnesses, necessarily excludes, and is apart from all corrupt concert between the witnesses.

When a defendant purchased in ignorance of any defect of title, though apprized of the claim of the complainant for a lien on the premises purchased, and took possession and made improvements under the opinion of counsel that the title was clear; and all his acts and the circumstances of

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

the case demonstrate, that at the time of his purchase, and when the improvements were made, he believed his title to be a good one, he is entitled to compensation, as a *bona fide* possessor, for the amount of his melioration and improvements of the estate, beneficial to the true owner.

Where a complainant has no absolute unqualified right to the interposition of a court of chancery—is only entitled to relief in the sound discretion of the court, which may be modified, made conditional, or wholly denied, as may be consistent with the dictates of equity and conscience, as when he seeks to enforce the specific execution of a contract—the defendant in possession will be allowed for such improvements, made *bona fide*, without a knowledge of the defect of his title, as have permanently enhanced the value of the lands, and to the extent of such enhanced value, the plaintiff is bound in conscience to make compensation, *ex æquo et bono*.

In ascertaining the value of lasting improvements, whether they are to be estimated at their *original* cost, or at their *actual* value, at the time of the audit made—if the property only is recovered, then the estimate is to be made at the time of the audit; but if rents and profits are charged agreeably to the improved value, then, at the original cost; or if independently of improvements, at the value at the time of the audit.

Where the enhanced annual value of an estate was, in a great measure, the result of expenditures made in the melioration of the soil, substantial justice is done by considering the enhancement of the rents as a fair offset to the expenditure for melioration.

Improvements will be estimated at the time of the audit, in the absence of proof of their original cost, the time when they were made, and their depreciation since, if any.

Ditching and grubbing meadow land, may be necessary, lasting, and valuable improvements; and if so, upon the proof must be allowed for accordingly.

APPEAL from the Court of Chancery.

The bill was filed on the 7th February 1835, by the appellant against the appellees, and amended on the 14th June 1838. The amended bill alleged, that *C. C. Jones* being largely indebted to *Clement Smith and others*, the said *C. S.* filed a bill against him, praying for the sale of certain mortgaged premises; that a decree was obtained, and on the 7th April 1823, the lands and personal property of *C. C. J.* were sold under such decree, and purchased by *Clement Smith* for the sum of \$23,976. That after such sale, it was proposed on behalf of *Smith*, that if the said *C. C. J.* would pay the said *Smith* \$22,000, that the said *Smith*, to avoid all further litigation, would relinquish all claim to the property sold under the decree, and then in *C. C. J.*'s possession; but *Jones*, pro-

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

testing that he did not owe *Smith* so large a sum, and being unable to procure the same, applied to *James Hawkins* to advance him \$10,000 in bank stock; and also certain bonds of *W. D. Digges*, for \$2500, with interest; and of *De Butts* to amount of \$3000; and promised to convey to *James Hawkins* in fee, in consideration of the advance of \$10,000, four hundred acres of the land, mortgaged and sold as aforesaid, to the said *Smith*, and to secure the amount due on the bonds aforesaid, by a lien on the remainder of the said land and personal estate aforesaid; and the said *James Hawkins* undertook and agreed to advance the money and bonds aforesaid, as aforesaid, if the said *Clement Smith* would agree to the same. Whereupon the said *Clement Smith* and *Charles C. Jones*, on the 15th January 1825, entered into the following agreement of writing, to wit:—

“Terms of compromise between *Charles C. Jones* and *Clement Smith*. *Basis*.—The bargain with *Hawkins* to be carried into effect by a conveyance from *Mr. Smith*, &c., upon turning over to *Mr. Smith* the proceeds for which he shall credit *Mr. Jones*, in account, at the market value of the stock; the other securities in the hands of *Jones* which *Smith* agreed to receive as cash, (as *Digges’* and *De Butts’* bond, now deposited with *Mr. Davidson*,) to be assigned over and delivered to *Smith*; and all the property, real and personal, of *Jones*, which was purchased by *Mr. Smith* at the trustee’s sale under the decree, to remain under lien for the balance, after deducting the sum total of the several items to *Mr. Jones’* credit, as aforesaid, from \$22,000, on such times and under such limitations, as *Mr. Lufborough*, and *Mr. Davidson*, and the counsel for the parties, may fix, so as *Jones* remained in possession, and have not less than a year to release the lien: the mode of releasing that lien, and the time in other respects, to be settled by the said reference. The personal property placed on the farm by *Mr. Smith* since his purchase, and there remaining, to be returned to him; such allowance for grain in the ground, crops, &c., as the referees may determine. The whole matter of detail to fill up this outline, so as to place the parties in a state of security and mutual accommodation,

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

to be filled up and provided for by the referees.—And as *Mr. Jones* disputes that his debt to *Mr. Smith* amounts to \$22,000, it is also agreed, that *Mr. Lufborough* and *Mr. Davidson* shall settle the account, so as to ascertain whether any, and what deduction, ought to be made from the \$22,000; and such deduction shall be credited against the balance charged upon the said property, accordingly. The securities above mentioned to be assigned as cash, are nevertheless, to be secured by the same lien as the balance above mentioned, and adequate provision by formal writings to be made for the whole, when the details are adjusted.”

The bill further charged, that the referees delivered their award to the said *Smith*, ascertaining and fixing the amount of the debt due from said *Charles C. Jones* to said *Smith*, at \$22,000, and requiring the liens to be executed as aforesaid; that *Smith* and *Jones* always acknowledged to said referees the right of said *Hawkins*, to be secured in his advances, to the amount of said bonds, by a lien as aforesaid, and the said *Smith* received the said bonds with that agreement and understanding. Nevertheless the said lien has never become executed by the said *Smith* to the said *Hawkins*, in his lifetime, or to his representatives, since his death; that *C. C. J.* failed to pay *Hawkins* during his life, who devised his estate to, &c.; that *C. C. J.*, at his death, was indebted to *Smith* for a large balance, parcel of the award; and that *Smith*, on the 13th June 1837, sold and conveyed to *John C. Jones* all the estate of *Charles C. Jones*, mortgaged to, and purchased by, the said *Smith*, not previously conveyed to the said *Hawkins*; that *John C. Jones* had full notice, before making his purchase, of the claim of complainant to a lien on the said premises; and that the said *Jones*, in order to secure to the said *Smith* the payment of the bonds of the said *W. D. D.* and *De B.*, has mortgaged the estate purchased by him, as aforesaid; that *C. C. J.*, from 1823, to his death, was insolvent, and often declared that the property he held, the *Clean Drinking* estate, and the personal property thereon, belonged to said *Smith* and *Hawkins*, and that he, *Jones*, was merely agent for them, and that *Smith* took possession thereof at his death, &c. Prayer,

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

that the amount of the bonds aforesaid, may be decreed to be a lien on the real and personal estate sold by the said *Clement Smith* to *John C. Jones*, after satisfying the balance due from the said *C. C. Jones* to the said *Clement*; that the said *Clement* may account and show what balance is still due from the said *C. C. J.* to him; and what sums he has collected on the said bonds; and that in default of the payment of the amount due from *C. C. J.* to said *James Hawkins*, the lands, &c., may be decreed to be sold; and for other and further relief.

With the original bill was filed "the admission of *C. C. Jones*, dated 5th November 1825; that the whole property mentioned in the bill, did belong to *James Hawkins* and *Clement Smith*; that it was merely under his care as agent. That as regards the hay and tobacco on the said estate, it should be under the exclusive control of *R. Ross* and *Nathan Lufborough*, for sale; that the net proceeds thereof be paid over to the said *Hawkins* and *Smith*; the amount of which they are to account for in any settlement which may hereafter be made with me, and by them, touching the fulfilment and execution of a conditional agreement, made between me and said *Smith*, in January last, (1825.) "

With the amended bill was filed a deed of the 1st July 1837, between *John C. Jones and wife*, of the one part, and *Clement Smith*, of the other, reciting, "that *C. S.* by deed, dated 13th June 1837, had conveyed to *J. C. J.*, for the sum of \$7275.65, all those lands, &c., except so much thereof as had been conveyed to *James Hawkins* by *C. S.*, and the personal estate belonging thereto, consisting of, &c.; and whereas the said *C. S.* did agree with the said *J. C. J.*, to sell and convey the said real and personal property for the said sum, upon express condition, that the said *J. C. J.*, by his indenture of mortgage or deed of trust of the said land and personal estate, secure the said *C. S.* the payment in full of principal, debt and interest, commission and expenses, of a bond executed by *W. D. Digges*, now dead, to one *S. H.*, and by him assigned to one *James Hawkins*, assigned to and for the use of *C. S.*, and which said bond, principal and interest, now amounts to \$5088;

Jones, adm'r of Hawkins, et al., vs. Jones.—1846.

and whereas the representatives of the said *James Hawkins* have set up a claim to a large amount of money, with the payment of which, it is or may be attempted to charge the real and personal estate therein before described, and as it is agreed between the said *J. C. J.* and *C. S.*, that he, the said *C. S.*, is to be secured against all loss upon the said bond, or by reason of the claim aforesaid, from the representatives of the said *J. H.*, which said claim is to be in no manner or respect altered, changed or prejudiced by the sale of the aforesaid real or personal estate, made by *C. S.* to *J. C. J.*; but in relation thereto, the said *J. C. J.* is to be considered and stand, as may, and did the said *C. S.*, before the said sale to *J. C. J.*; and conveying the property to indemnify *C. S.*, with authority to sell the property, if necessary, for his security.”

The answer of *John C. Jones* to the original and amended bill admitted, that in the year 1820, the late *Charles C. Jones* being then largely indebted to *Clement Smith* for the security of said debt, conveyed to him, by way of mortgage, the tract called “*Clean Drinking*,” and a valuable personal property; that the debt not being paid, he obtained a decree for a sale; the sale was made; *Smith* became the purchaser of all the property mortgaged; that the sale was duly confirmed; that a conveyance was made to *Smith*, who had thus a clear, absolute, and perfect title and possession; that *Smith*, for \$12,000, sold 400 acres of his purchase to *James Hawkins*, now deceased, and executed to him a conveyance therefor. The defendant *J. C. J.* further admitted, that he has been informed, but has no personal knowledge on the subject, that *C. Smith*, at or about the time of the sale to *Hawkins*, before spoken of, verbally agreed with the said *C. C. Jones*, that if the said *Jones* would pay him the residue of the debt for which the property had been sold, as aforesaid, that he would reconvey to him the residue of said property; but this defendant has been informed, and believes, and charges, that the said *Jones* never did pay the balance of the said debt, or any part thereof; that nothing was done towards performance or part performance of said parol agreement; that said *Smith* in fact never did give a lien on the said property to *Hawkins*, or any other person.

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

The answer, among other matters, also admitted, that the defendant became the purchaser of a part of *Clean Drinking*, for a full, fair, and adequate consideration; that at the time he so purchased the said property, he knew that the representatives of the said *Hawkins* set up some such claim as is asserted in their bill, and that complainant's exhibit, No. 4, is a true copy of the mortgage executed by him to the said *Clement Smith*; that he had never given, nor agreed to give, the said *Hawkins* any mortgage or lien whatever on the said property. The defendant also admitted the death and insolvency of *C. C. Jones*. He denied all knowledge of the agreement between *Hawkins*, *Jones*, and *Smith*, as charged, and insists it was void, (if made,) under the statute of frauds, being merely by parol, and that he may have the benefit of the statute at final hearing. The answer also relied upon the statute of limitations; and further, that the complainant can have no relief, without fully reimbursing to the defendant the principal and interest of the money he has paid to the said *Clement Smith*, and all costs and expenses which he has incurred in consequence of his said purchase, and also for all improvements which he has made and erected upon the said property, of every description, which he alleges to be considerable, &c.

With the bill was exhibited :—

The will of *C. C. Jones*, *Eleanor C. Coates*, adm'x, and *J. C. Jones*, devisee.

Exhibit No. 4, deed of 1st July 1837, *John C. Jones* and wife, to *Clement Smith*.—*Ante* page 89.

After a great variety of proof was taken, the chancellor, (BLAND,) being of opinion that the proofs did not sustain the allegations in the bill, decreed, on the 28th July 1841, that the bill should be dismissed with costs. From that decree the complainants appealed to this court.

On the 30th June 1843, this court reversed the decree of the chancellor, with costs; and decreed, that unless the said *J. C. Jones*, on or before the 1st January 1844, pay or bring into the court of chancery, to be paid *Joseph H. Jones*, a. d. b. n. of *Joseph Hawkins*, deceased, and administrator of *Susanna Clagett*, residuary legatee of *James Hawkins*, the sums of

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

money mentioned in the proceedings in this cause, as having been advanced by the said *Hawkins*, or received by *Clement Smith*, upon the bonds of *Digges* and *De Butts*, assigned by the said *Hawkins* to *Charles C. Jones*, for the use of *Clement Smith*, or to said *Clement Smith*; which said sums of money with interest due thereon, shall be ascertained by the auditor of the court of chancery, on or before the 1st September next; subject, nevertheless, to all just exceptions as to the amount thereof, &c.; then the real and personal estate, in the proceedings mentioned, or so much thereof as may be necessary, be sold; and out of the proceeds thereof, after payment of the debt of the said *Clement Smith*, with all interest due thereon, to the said *John C. Jones*, assignee of the said *Clement Smith*, to be also ascertained, as aforesaid, the claim of the said complainant, *Joseph H. Jones*, also to be ascertained as aforesaid, shall be paid.

And it was further decreed, that in the event of the said *J. C. Jones* declining or omitting to pay or bring into court the sums of money due to the complainant, *Joseph H. Jones*, according to the principles and directions of this decree, that then an account of rents and profits, hires, issues, receipts, fruits and proceeds of the said real and personal estate, shall be taken, and the said *John C. Jones* shall be charged therewith; and that he shall be allowed for all just and necessary improvements, made by him upon the said estate after he came into possession thereof; and the balance thereof, if any due by the said *John C. Jones*, applied to the payment of his claim as assignee of the said *Clement Smith*. That *R. J. B.* be appointed trustee, &c.; and the cause be remanded to the court of chancery, for the purpose of executing this decree, &c.

The cause was accordingly remanded to the court of chancery, where the parties took proof in relation to the rents and profits of the estate, and the improvements, cost and character of them, as made by the appellee, *John C. Jones*, during his possession of the estate.

On the 31st July 1844, the chancellor, (BLAND,) ordered, that this case be, and the same is hereby referred to the auditor, with directions to restate the account, from the pleadings

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

and proofs now in the case, in pursuance of the decree of the Court of Appeals. The auditor will assume the consideration of \$7275.65, specified in the indenture of the 1st July 1837, as the amount then due to the defendant, *John C. Jones*, as assignee of *Clement Smith*. That no interest is to be charged on the rents and profits, hires, issues and fruits, and proceeds of the said real and personal estate; that nothing is to be allowed for the ditching of any part of the land, or for any thing else done upon it, in any course of husbandry pursued by the occupying tenant; that the defendant, *John C. Jones*, is to be allowed for all just and necessary improvements made upon the estate after he came into possession thereof, estimating their value respectively, as of the date when they may have been so made: but no interest is to be charged on any sum so allowed and provided. That no allowance for improvements be made beyond the amount of the rents and profits; and that as so much of the interest on the bonds spoken of as part of the plaintiff's claim, as accrued during the lifetime of *Elizabeth Hawkins*, deceased, after the death of the plaintiff's intestate, constitutes no part of the plaintiff's claim, she having been the legatee thereof for life: the principal of the said bonds, with interest thereon, only during the life of the said intestate, and after the death of the said *Elizabeth Hawkins*, is to be awarded to the plaintiff. These directions are given to the auditor to the end, that an account may be stated, to enable this court to carry into effect the decree of the Court of Appeals, according to its true intent and meaning; and therefore all the exceptions of the parties, with so much of the former report of the auditor as may be at variance with this order, be, and the same are hereby overruled and rejected.

The auditor, in pursuance of this order, reported, that he had assumed the amount of the mortgage debt, as directed in the order, and credited the estate with certain stock, farming utensils, and slaves sold by the defendant. That he had deducted from the rent, a certain annual amount for rent of property, not parcel of the mortgaged premises, as testified to by one of the witnesses; that as no allowance had been made for improvements in the course of husbandry, the rent had been

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

reduced for the years 1841, 1842, 1843, and 1844, to the estimate of 1837: inasmuch as it appears from the testimony, that the increased estimate of rent is based on that kind of improvement; that the value of all the just and necessary improvements falls short of the rent and hires, and the difference credited to the estate.

After exceptions taken to this report, the chancellor, (BLAND,) on the 29th April 1845, ratified the accounts, which stated the amount due *J. C. Jones* to be \$7939.59, with interest; and that due the complainants, \$10,923.17, with interest.

From this order, both parties appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, and MARTIN, J.

By R. J. BOWIE for the appellants, the complainants below.

By J. JOHNSON and RANDALL for the appellee, the defendant below.

DORSEY, J., delivered the opinion of this court.

The ground of complaint most strenuously relied on by the plaintiff below, against the orders from which he has appealed, is, that, in virtue of a direction from the chancellor to the auditor, the sum of \$7275.65 has been assumed in account E, as the balance due, on the 30th June, in the year 1837, from the late *Charles C. Jones* to *Clement Smith*, and which was a preferred lien on the *Clean Drinking* farm, and the personal property thereon, sold many years before by the latter to the former. On the day and year aforesaid, the said property was conveyed, with all his interest therein, by the said *Clement Smith* to *John C. Jones*, one of the defendants below. By the decree of this court, heretofore passed in this cause, that interest, in equitable contemplation, was but a lien upon the premises for the balance due by *Charles C. Jones* to *Clement Smith*, at the date of the above mentioned conveyance. That in 1825, at the time of the compromise, as it is called, there was due, from the former to the latter, a balance of \$12,000, has long since ceased to be a matter of controversy. What part of that balance remained due on the thirtieth of June 1837, is the question now to be

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

examined; and upon the solution thereof depends the justice of the complaints of the plaintiff below, against what he appears to regard as an arbitrary assumption by the chancellor, of the sum of \$7275.65, as the balance due at that time. Account A, as stated by the auditor, which shews a less sum than \$7275.65, as the balance due on the 30th of June 1837, is based upon exhibit CS, which gives large credits, independently of the bonds of *Digges* and *De Butts*, that are wholly unsustained by any other proof or exhibit in the cause, and which, if rejected, would leave a much larger balance due to *Clement Smith* on the 30th of June 1837, than that assumed by the chancellor, as the basis or starting point for the auditor's statements. The chancellor, it is presumed, regarding, as does this court, exhibit CS, (which consists of mere pencil marks upon an isolated piece of paper, unexplained by any testimony, to shew the times or occasion which gave birth to it,) as testimony of too loose and questionable a character, to be made the basis on which the rights of the parties litigant in this cause should be adjusted, directed the auditor to assume, as the balance due from *C. C. Jones* to *Clement Smith*, the sum of \$7275.65, at the date of the deed from *Clement Smith* to *John C. Jones*. This balance was not, as appears to be supposed, arbitrarily assumed, without regard to the testimony in the cause, and in disregard of the interests of the plaintiff below. The assumption was made for his benefit, as, after the rejection of exhibit CS, a detailed statement of debits and credits would have exhibited a much larger balance. It was made in reference to the testimony in the cause, the chancellor regarding the purchase money expressed in the deed from *Clement Smith* to *John C. Jones*, as an admission by them of the then balance due to *Smith* from *C. C. Jones*. After the rejection of exhibit CS, of which we approve, with the chancellor's assumption of such balance, the plaintiff below ought to have been satisfied. But not so the defendant. He, being entitled to the entire balance due to *Smith*, had a right to complain that the chancellor had overlooked the testimony of *John Marbury* and *Clement Cox*, which proved, as far as concerned admissions by *Clement Smith* and *John C. Jones*,

Jones, adm'r of Hawkins, *et al.* vs. Jones.—1846.

(and by such admissions only could it be reduced to the amount assumed by the chancellor,) that the balance due from *C. C. Jones* to *C. Smith*, was \$7375.65, instead of \$7275.65. For this reason, therefore, if all others were wanting, the appeal of the defendant, *John C. Jones*, must to that extent be sustained.

But this is not the only ground upon which it can be sustained. The testimony given by the nine witnesses, testifying as to the amount of rent with which *J. C. Jones* should be charged, as the occupant of the *Clean Drinking* estate, being of such a nature as to require to be averaged, the auditor made a statement for that purpose, in which, instead of obtaining the aggregate amount, by adding together the estimate of each and every witness who testified thereto, (without reference to their agreement or disagreements in the amounts of their estimates,) and dividing the sum thus obtained by the entire number of such witnesses, by which means, the averaged amount of rent would have been fairly and justly ascertained; three of the witnesses having deposed, that \$150 per annum would be a fair rent; two that \$300 would be; and the remaining four witnesses having each deposed to a different amount, he added one \$150 for the three concurring witnesses, and one sum of \$300 for the two concurring witnesses, to the several amounts of the four dissentient witnesses, and to reach the true average result, divided the sum thus obtained by six, thereby, in effect, rejecting altogether the testimony of three of the witnesses, and making the averaged rent \$316.67; whereas, in this case, if the aggregate sum had contained, as it should have done, the estimate of each and every witness, and been divided by nine, (the whole number of witnesses,) the annual average rent with which *John C. Jones* should have been charged, would have been but \$277.78. By such a rule of averaging testimony as this, if a plaintiff has fifty witnesses, all of whose estimates agree in amount, and the defendant has one witness making a different estimate, forty-nine of the plaintiff's witnesses are virtually rejected; and the decision of his case is identically the same that it would have been, had he sworn in his behalf but one of his witnesses. If any thing further could be necessary to shew the injustice and unreasonableness of such a rule, its applica-

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

tion to figures would, perhaps, be a clearer demonstration. Should the estimates of fifty concurring witnesses for the plaintiff be one dollar, and the estimate of a defendant's only witness should be \$1000, the average value, under this rule, would be \$500.50. But if the plaintiff's witnesses should all differ in their estimates, that of each succeeding witness being one cent higher than that of the next preceding, (so that the estimate of the first witness being one dollar, that of the last would be \$1.49,) the average value by this rule would be a fraction less than \$19.87; and yet, apart from all corrupt concert between the witnesses, which the rule of average necessarily excludes, could it, in reason, justice, or common sense, be for one moment supposed, that the plaintiff's interests were less strongly fortified by proof in the first hypothesis, than in the second. The order of the chancellor of the 29th of April 1845, resting on such a rule of average, and being appealed from by *John C. Jones*, must be reversed.

The plaintiff below complains, that no credit has been given him for the proceeds of sale of a great number of the negroes of *C. C. Jones*, sold since the sale of *Clement Smith* to *John C. Jones*. But from a careful examination of all the testimony properly before us, it appears that the auditor, in account E, has given every credit for the sale of negroes since the 30th of June 1837, to which the plaintiff below was entitled. And there is no foundation for the complaint, that four negroes were sold to *William J. Stone*, and credit given but for the price of one of them. *Stone* himself conclusively proves, that for *George* and *Polly*, no credit ought to be given. That he considered them of no value, but an incumbrance upon his bargain. That he offered the same price which he paid for the four, for the other two, and *John C. Jones* refused to sell him the two young negroes, unless he would take, with them, the two old negroes, *George* and *Polly*, their father and mother. And there is abundant proof in the record, that *Sam*, one of the young negroes sold to *Stone*, was not held by *J. C. Jones*, under the conveyance from *Clement Smith*, but that he was the *bona fide* owner of him, as a purchaser at a sheriff's sale. So far from allowing any credit to the plaintiff below, on

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

account of the sale of *George and Polly*, the auditor, who will be directed to state an account, according to the views of this court upon the record, as now before it, will be instructed, upon *Barnecko's* testimony, to credit *John C. Jones* with sixty dollars for the maintenance of those negroes. And it is a matter of great doubt, whether the credit ought not to be for sixty dollars a year, from the 30th of June 1837, until the sale to *Stone*, in 1842.

Several other objections to the auditor's account E, dependent on the facts in the case, have been urged by the plaintiff below, but believing that a due examination of the proof in the cause shews them to be untenable, we forbear to discuss them.

On the part of the plaintiff below, it has been insisted, that the decree of this court on the former appeal, has been misunderstood by the chancellor, in supposing that it authorised allowances to *John C. Jones* for any improvements, other than necessary repairs. And to prove that such was the meaning of this court, numerous authorities have been referred to, as shewing that such were the only allowances that could legitimately have been made. For this purpose, the case most strongly relied upon was that of *Moore vs. Gable*, 1 *Johns. C. R.*, 385, where a mortgagee in possession, on a bill by a mortgagor to redeem, was not allowed for clearing wild lands. Chancellor *Kent* there remarks, that "to make the allowance would be compelling the owner to have his lands cleared, and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of redemption." "Lord *Hardwicke*, (in 3 *Atk.*, 517,) there said, that a mortgagee in possession, was not obliged to lay out money any further than to keep the estate in necessary repair." And chancellor *Kent*, proceeding with his opinion, said, "I shall accordingly direct a master to compute the principal and interest due on the mortgage down to the first of January last, and that, in taking the account, he charge the defendant with the net amount of rents and profits received, except such as shall appear to have exclusively arisen from his own expenditures in improvements; and that he allow for the expense of necessary reparations, if any, but not in

Jones, adm'r of Hawkins, *et al.*, vs. Jones —1846.

clearing part of the land, and that he report with all convenient speed." The condition of the parties in the case before us is, as we shall hereafter have occasion to shew, different from that in the case in 1 *Johns. C. R.*, 385, and therefore under the governance of different principles. But it may not be amiss to observe, that it would be difficult to reconcile, with the broad and liberal principles of a court of equity, the instruction of the learned chancellor, (if intended as of general application,) to charge the defendant with the whole amount of rents and profits, except such as shall appear "to have exclusively arisen from his own expenditures in improvements." If therefore, for example, a mortgagee, (in possession,) of a mill worth ten dollars per annum, by its reconstruction or enlargement, not repair, render it of the annual value of \$1000, he is to be charged with the full amount of such enhanced rent, and be allowed nothing for expenditures in the improvement. But if the mortgage be of the mere site of a mill, of no value in its then condition, and the mortgagee build a mill, the annual rent whereof is \$1000, an allowance is to be made him out of the rents received for his expenditures in the improvements. If the allowance in the latter case be correct, it is not easily discovered why a proportionate allowance ought not to be made in the former case.

Many other cases were referred to, shewing that allowances for expenditures in repairs ought to be made, but not for expenditures in new improvements. And authorities were referred to, to prove that allowances should be made in both cases. But these were cases of defendants knowingly and avowedly holding as mortgagees or as tenants, after notice to quit; or as trespassers or wrong doers.

In 1 *Pow. Mortg.*, 313, *note (o)*, the learned annotator, after referring to the contradictory decisions as to allowances to tenants for life, or mortgagees in possession, for improvements made by them, states, that "the old rule would now, perhaps, be considered obsolete, and the tenant for life, or mortgagee, allowed in full for all reasonable and permanent improvements, with interest from the time he made them." And in 2 *Pow. Mortg.*, 956, *note (e)*, he says, "it may be proper in this place

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

to add, that the mortgagee, in accounting, will be allowed all costs of suit, taxes, renewal fines, sums expended in necessary repairs and lasting improvements." The same doctrine has been sanctioned by chancellor *Bland*. See *Hagthorp vs. Hook's adm'rs*, 1 *Gill & Johns.*, 373. But conceding in this case, (what is by no means designed to be generally admitted,) that it is otherwise, and that, as a general rule, mortgagees and tenants for life, rightfully in possession, can only be allowed for expenditures made in necessary repairs, and are entitled to no allowance for those made in lasting improvements; yet this case has in it a discriminating feature, which, in the eye of a court of equity, should entitle the defendant, *J. C. Jones*, to the controverted allowances, designed to be secured to him by the former decree of this court. In 2 *Pow. Mortg.*, 956, note (*e*), it is stated, that "where a mortgagee, *thinking himself absolutely entitled*, had expended considerable sums in repairs and lasting improvements, he was allowed such expenditures." And, in page 957 of the same book, it is stated, "it seems that money laid out by a mortgagee in repairs and beneficial improvements, forms a lien on the land; but in ordinary cases, money laid out in improving premises, does not create a lien; yet, if a party, *conceiving himself to be owner*, makes lasting improvements, a court of equity, it is assumed, would not take the estate from him, without compelling the plaintiff to make some allowance for the sum expended in improving the premises."

In 1 *Story's Rep.*, 494, *Story, J.*, says: "In cases where the true owner of an estate, after a recovery thereof at law, from a *bona fide* possessor, for a valuable consideration, without notice, seeks an account in equity, as plaintiff, it is the constant habit of courts of equity to allow such possessor, (as defendant,) to deduct therefrom the full amount of all meliorations and improvements, which he has beneficially made upon the estate; and thus recoup them from the rents and profits. So if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid, only upon the terms, of making compensation to such *bona fide* possessor,

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

for the amount of his melioration and improvements of the estate, beneficial to the true owner. In each of these cases, the court acts upon an old and established maxim in its jurisprudence, that "he who seeks equity, must do equity." To the benefit of these equitable principles, the defendant, *John C. Jones*, has shewn himself entitled. He purchased in ignorance of any defect of title, though apprized of the claim of the plaintiff below, and took possession, and made the improvements, under the opinion of counsel that the title was clear. All his acts, and the circumstances of the case, demonstrate, that at the time of his purchase, and when the improvements were made, he believed his title to be a good one.

But suppose it were conceded, that where the title is clear at law, and where a claimant, under such a title, goes into equity for an account of rents and profits; or where the right to the interposition of a court of equity, in asserting the title sought to be established, is absolute and unqualified, and subject to no discretion in the court to grant or withhold it, an allowance can only be made to a defendant, possessor, for necessary repairs, and none for new buildings or improvements: yet this case stands unaffected by such a concession. Here, the plaintiff below presents no such absolute, unqualified right to the interposition of a court of chancery. His appeals for relief are addressed to the sound discretion of the court; and the relief sought, may be modified or made conditional, or be wholly denied, as may be consistent with the dictates of equity and conscience. The plaintiff below, seeks to enforce the specific execution of a contract; which is, always, an appeal to the conscience and sound discretion of the court. From such an application, if unconscientiously or unreasonably made, a court of chancery will, either, altogether withhold its relief, or grant it upon such terms as to render it consistent with equity and justice. That such terms would secure to *John C. Jones* an allowance for his lasting improvements on the *Clean Drinking* estate, cannot be regarded as a subject for doubt. In such cases, the appropriate enquiry might be, were the improvements made *bona fide*, and without a knowledge of the defect of title? If answered in the affirmative, in the language of

Jones, adm'r of Hawkins, *et al.*, vs. Jones.—1846.

Justice Story, they “have permanently enhanced the value of the lands, to the extent of such enhanced value, the plaintiff is bound in conscience to make compensation, *ex æquo et bono*.”

The plaintiff below, claims a reversal of the order of the chancellor of the 29th of April 1845, because he has, thereby, ratified the auditor’s account E, in which the lasting improvements of *John C. Jones* are charged at their original cost, and not at their actual value at the time of the audit. And to sustain his objection, he has cited *Hagthorp et al., vs. Hook’s adm’rs*, 1 *Gill & John.*, 373, wherein chancellor *Bland* uses the following language: “but the estimate of the value of such lasting improvements, is to be taken as they are at the time of accounting or passing the final decree. For such allowances are made upon the ground, that the improvements do, in fact, pass into the hands of the plaintiff as a new acquisition. And they can only be a new acquisition to him, to the extent of their value at the time he recovers or obtains possession of them, and therefore their value, at the time, is to be allowed, and nothing more.” This is true or not true, according to circumstances. If property only is recovered, then is the rule, as laid down by the chancellor, equitable and true. But if rents and profits are charged, it is true or false, equitable or inequitable, according to the mode in which such charges are made. If the rents and profits are charged agreeably to the improved value, then is the doctrine unsound and inequitable; if upon the value, independently of the improvements, then is the rule announced by the chancellor equitable and sound.

It is true, in this case the rents and profits have been charged according to the value of the land, before the lasting improvements were made; but to state the account upon the proofs in the cause in any other way than it has been, with any certainty of doing more justice to the parties, was not in the power of the auditor. It was in proof that the enhanced annual value of the estate was in a great measure the result of expenditures, made in the amelioration of the soil, and by the purchase of quantities of manure, gypsum, and clover, and timothy seed, &c., an allowance for which *John C. Jones* would have been entitled, had he been charged with the enhanced rents resulting

Ricketts vs. Ricketts.—1846.

from his expenditures for such amelioration. The auditor, therefore, believing that substantial justice would be thereby effected, very properly considered the enhancement of the rents, as a fair offset to the expenditures for amelioration, and allowed nothing for either.

In adopting the proof of the first cost of the improvements, as their value at the time of the audit, the auditor could not have done otherwise: there being an absence of proof before him, of the times at which the improvements were made; of the amount of their depreciation in value; or that they had suffered any such depreciation; or of what their then value was.

On the appeal taken by *John C. Jones*, we think injustice has been done him, in rejecting all allowance for his expenditures in ditching and grubbing the meadow land. From the nature of the services rendered, and the proof in the cause, they were necessary, valuable and lasting improvements, and entitle him, for them, to a fair and equivalent allowance.

This case, on the appeal by *J. C. Jones*, being about to be reversed, the auditor of the court of chancery will be requested to state an account pursuant to the views, and under the direction of this court; upon the report whereof a decree will be passed, disposing of the present appeals, and settling the matters in controversy under them.

DECREE REVERSED WITH COSTS.

LOVERING RICKETTS vs. VIOLETT RICKETTS.—*June* 1846.

Under the act of 1841, chap. 262, divorces *a mensa et thoro*, may be decreed in equity for cruelty of treatment—or excessively vicious conduct, abandonment, and desertion.

In a case of great cruelty, harsh usage, for a series of years, practised by the husband towards his wife, such a divorce will be decreed.

Where the income of the husband may be fairly estimated at nine hundred dollars per annum, alimony out of that income of one-third of its amount, for the maintenance of an aged wife, who has been compelled to abandon her home by his cruelty, is not unreasonable.

Ricketts vs. Ricketts.—1846.

The amount of alimony must depend on the circumstances of each case.

The court has power to compel the husband to pay a proper fee for retaining counsel, to aid the wife in the prosecution of the bill against him, for divorce and alimony.

Upon a bill filed for divorce and alimony, the defendant, the husband, having been summoned, and not appearing in the cause, proof being taken of his title to various items of leasehold property, upon petition of the wife, alleging, she was advised by her counsel, that it was in the power of her husband to alien the same, and the proceeds to secrete pending her bill, and so make null and void, to all practical purposes, any order for her maintenance, the court awarded an injunction, prohibiting him from alienating any part of the landed property or chattels in this State, of which she had given evidence.

Where the county court, by an interlocutory order, *pendente lite*, ordered the husband to pay a sum for her maintenance during the progress of the cause, it is error at the passage of the final decree to increase that allowance, by ordering a further sum in gross to be paid.

APPEAL from the Equity side of *Baltimore* county court.

The bill in this cause, was filed by the appellee against the appellant, on the 28th October 1843, for a divorce *a mensa et thoro*, and alimony. It alleged their marriage in 1812, the faithful conduct of the complainant; that her husband "hath for many years treated her with the grossest unkindness, insulting her with the falsest and most opprobrious allegations and epithets, defaming her to others, and sometimes proceeding to assaults and blows upon her person; that he indulges in periodical excesses of intemperance, during which his conduct towards her is marked by the most outrageous and intolerable violence and abuse; and has also charged her with adultery, which she denies."

The defendant, the appellant, being summoned, and not appearing, an interlocutory decree was passed against him, and a commission ordered to take the complainant's proof. Under the commission a great variety of testimony was taken.

On the 30th April 1845, *Baltimore* county court, (LE GRAND, A. J.,) decreed, that the divorce *a mensa et thoro*, be granted as prayed, and that the defendant, *L. R.*, pay unto the plaintiff, *V. R.*, or to her order, during their natural lives, so long as they shall live separate and apart from each other, the annual sum of \$300, payable half yearly; that is to say, \$150 on the first day of May, and the like sum on the first day

of November, in every year, the first payment to be made on the first day of November next, the same being deemed a suitable alimony, having regard to the circumstances of the parties respectively, for her support and maintenance; and in case it should not be punctually paid, when demanded, the plaintiff may apply to this court to have the payment enforced. And it is further ordered, that each party be at liberty to apply, upon any future change of circumstances of the parties, or either of them, for such variation or modification of this decree as those future circumstances may indicate to be just. And it is further ordered, that the injunction heretofore issued in this cause, inhibiting the said *L. R.* from aliening the property therein referred to be continued, until the said *L. R.* shall, under the direction of this court, convey unto *James B. George*, as trustee for the said *V. R.*, such property as shall be deemed by this court sufficient to yield to the said *V. R.*, at the county of *Baltimore*, the above named annual sum, free and clear from all charges and abatements for the collection and payment of the same. And it is further decreed, that the said *L. R.* do, and shall forthwith, pay unto the said *V. R.*, the sum of \$200, the same being considered, together with the sum of \$100, heretofore paid to her by order of this court, as a suitable allowance for her support and maintenance, since the said *Lovering Ricketts* withdrew from her his countenance and conjugal protection; and the further sum of \$300, which is deemed a suitable allowance to her for the retaining of counsel, to defend her honor and maintain her interests in the present suit, and the suit instituted against her by her said husband, and which has been specially referred to in these proceedings; and it is further ordered, that the defendant pay all costs, &c.

The county court, although the defendant had never answered the bill of complaint, nor appeared to the suit, yet the court consented to hear his counsel in his behalf, at the argument of the cause.

The judge said, from the evidence taken under the commission, but one opinion could be formed of the conduct of the defendant to his wife, the complainant, and that is, that

Ricketts vs. Ricketts.—1846.

it was of the most cruel and unmanly character. His counsel, however, has stated to the court, in way of excuse for his treatment of his wife, that on the subject of their conjugal relations, he is undoubtedly laboring under sad delusions. Taking this to be the fact, as though it had been regularly proven in the cause, it is nevertheless manifest, that such a disposition on the part of the husband, renders it unsafe for his wife longer to live with him, and it is clear beyond all doubt, that the wife has done nothing which renders her unworthy of his confidence and protection, and as it is his duty to furnish her the means of subsistence suitable to his condition in life, the court have thought, looking to his fortune, that the allowance of the sum of \$300 per annum, would not be an improper provision for her, and have accordingly so decreed. As the duty of the husband to protect the honor and reputation of his wife, is even more urgent upon him, than that of providing her a decent support, and as he has assailed her honor and reputation, justice demands that the expenses to which she has been put in their defence should be paid by him, it has been so decreed. Allowance has also been made for her expenses during the separation. It has not been deemed necessary to cite any authorities in justification of the decree, inasmuch as there cannot be any doubt of the jurisdiction of the court, nor of the sufficiency of the estate of the husband to gratify, without unreasonable inconvenience to him, its requisitions.

From this decree, *L. R.* appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE and MARTIN, J.

By McLEAN for the appellant, and

By T. P. SCOTT and REVERDY JOHNSON for the appellee.

MARTIN, J., delivered the opinion of this court.

In this case, a bill was instituted by the appellee, under the act of Assembly of 1841, chap. 262, for a divorce *a mensa et thoro* from her husband, the appellant, and for alimony; on the ground, that she was cruelly treated by her husband.

Ricketts vs. Ricketts.—1846.

The third section of the act of Assembly, conferring upon the chancellor and the county courts, as courts of equity, jurisdiction over divorces, declares: "That upon such petitions as aforesaid, divorces, *a mensa et thoro*, may be decreed, for the following causes: *first*, cruelty of treatment; *secondly*, excessively vicious conduct, abandonment, and desertion." And we are satisfied, that the testimony taken under the commission, has established a case of great cruelty and harsh usage, practiced by the husband for a series of years. It is clear, therefore, that the decree for the separation of these parties, *a mensa et thoro*, is correct.

It appears that the court, in pronouncing their decree for a divorce, allotted the sum of three hundred dollars a year, as permanent alimony; and it has been contended by the counsel for the appellant, that the decree in this respect was erroneous, as the allowance was excessive.

The income of the appellant may be fairly estimated as amounting, at least, to the sum of nine hundred dollars, and the allotment out of that income of three hundred dollars *per annum*, for the maintenance of an aged wife, who has been compelled to abandon her home by the cruelty of the husband, cannot be justly regarded as unreasonable.

The amount of alimony to be allotted to a wife, who has proved herself entitled to a separate maintenance, must depend on the circumstances of each case. The law has laid down no exact proportion. It sometimes gives a third, sometimes a moiety. The object to which the attention of the court is directed, and at which it aims, is to secure to a wife, by a suitable provision, a certain and comfortable maintenance. This must be accomplished, no matter to what privations or inconveniences it may subject the guilty husband. Therefore it was said in the case of *Taylor against Taylor*, referred to in *Cooke against Cooke*, 2 *Philb. R.*, 40, "that the court always gives a larger proportion, where the income is small."

The sum of three hundred dollars a year, cannot be considered as more than sufficient, to provide for the appellee a suitable maintenance. It will be found, that the principles

Ricketts vs. Ricketts.—1846.

announced in the case of *Cooke against Cooke*, already adverted to, sustain the correctness of the decree.

It has also been insisted that the decree is erroneous, in allowing the sum of three hundred dollars as a proper fee for retaining counsel in the defence and prosecution of the suits mentioned in the proceedings; not upon the ground, as we understood the counsel for the appellant, that the allowance was too large, but because the court had no right to allow to the appellee, any other than taxed costs.

We cannot admit the correctness of the rule as stated by the counsel. If true, it is apparent, that it would in many instances deprive the injured wife of the means of vindicating her rights. In *Denton against Denton*, 1 *Johns. C. Rep.*, 364, the chancellor held: "That pending a bill for a divorce, by a wife against her husband, and before answer, the court will allow a monthly sum to the wife as alimony, and also a sum, to be paid to her by her husband, towards defraying the expenses of the suit." The same doctrine is advanced in the case of *Mix against Mix*, 1 *Johns. C. Rep.*, 108, and establishes the propriety this allowance.

It follows from the views thus expressed, that we concur with the court below, in so much of the decree as relates to the divorce; to the allowance of three hundred dollars a year, as alimony; and to the allowance of three hundred dollars for counsel fees. But we think that the court erred in allotting the sum of two hundred dollars, in addition to the one hundred dollars, which the decree states was allowed by an antecedent order, as alimony, *pendente lite*.

The decree, therefore, is affirmed with costs, in all respects, except as to the two hundred dollars. In reference to this sum it is reversed, and the cause is remanded to *Baltimore* county, as a court of equity, for such further proceedings as the nature of the case may require.

DECREE REVERSED IN PART, AND

CAUSE REMANDED.

Griffith vs. Turner.—1846.

ISRAEL GRIFFITH vs. PHILIP TURNER.—*December* 1846.

T addressed a letter to *G*, informing him that *E* and *P* were about to embark in business together, and stating, "should they make a bill with you, I will be responsible for the amount;" HELD, that the engagement on the part of *T*, was to be responsible for such bill as *E* and *P* should make, and not such bill as they should acknowledge they had made.

In an action to enforce the above guaranty, *P* had a right to have the delivery of the goods proved in the accustomed mode, and not by hearsay evidence. *E* and *P* were witnesses, and could have been examined to establish such delivery to them.

If *E* and *P* could be considered as agents, their declarations, *ex post facto*, in relation to the purchase, would not be admissible evidence to charge *T*.

In the presence of *T*, one of the firm of *E* and *P*, admitted the amount of their purchase from *G*, and that subsequent to said conversation, *T* called, in company with *E*, and expressed a wish that the same might be paid. HELD, that if *T* had knowledge of the facts admitted by *E*, and heard the admission, without observation, he might be considered by the jury as acquiescing, by his silence, in the verity of such admission.

Whether he had such knowledge, was a question of fact for the jury.

The reasons assigned by the court in 5 *Binney*, 198, for the admission in evidence of the declarations of a party who purchased goods, under a guaranty to charge his guarantor, are not satisfactory to this court.

The rejection of such admissions, is placed on the true legal ground in the case of 5 *Esp.*, 27.

The confession of a judgment, was received in evidence in the case of 12 *Wheat.*, 515, on the ground of the peculiar form of the guaranty, which made the guarantor answerable for the conduct and all the engagements of his son.

APPEAL from *St. Mary's* county court.

This was an action of *assumpsit*, commenced on the 1st July 1842, by the appellant against the appellee, who pleaded the general issue.

At the trial of this case, the plaintiff to support the issue on his part joined, read to the jury the following letter from *Philip Turner* to *Israel Griffith*, having first proved the signature of *Philip Turner* to said letter.

"Chaptico, 12th Oct. 1840.

MR. ISRAEL GRIFFITH,

Dear Sir:—The bearer, *Mr. James H. Egerton*, and his brother *Philip*, are about to embark in the mercantile business in *Benedict*. I beg leave to introduce them to your acquaint-

Griffith vs. Turner.—1846.

ance, as being worthy of confidence. Should they make a bill with you, I will be responsible for the amount.

PHILIP TURNER."

And then gave in evidence, that the *Messrs. Egertons* admitted, that they did make a bill with said *Griffith* on the 30th of November 1840, for \$153.92; and further gave in evidence, that *one* of the *Messrs. Egertons*, in the presence of *Philip Turner*, admitted the amount of said bill; and when said guarantee was in the hands of the counsel of *Israel Griffith*, and admitted that the same was due; that said *Philip Turner*, subsequent to said conversation, called, in company with said *Egerton*, and expressed a wish that the same might be paid and settled; and at the same time, certain claims were assigned to the attorney of *Israel Griffith*, as collateral security, by the said *Egertons*, to pay the same, and other claims against the said *Egertons*. Whereupon, on the prayer of the defendant, the court, (C. DORSEY, A. J.,) rejected the testimony, as not tending to shew an indebtedness on the part of the defendant to the plaintiff. The plaintiff excepted.

The verdict and judgment being against the plaintiff, he prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY and MARTIN, J.

By J. JOHNSON for the appellant, and

By H. W. THOMAS for the appellee.

ARCHER, C. J., delivered the opinion of this court.

This suit was instituted against the defendant, to recover from him for goods alleged to have been sold and delivered on the following letter of guarantee.

"MR. ISRAEL GRIFFITH,

Dear Sir:—The bearer, *Mr. James H. Egerton*, and his brother *Philip*, are about to embark in the mercantile business in *Benedict*. I beg to introduce them to your acquaintance, as being worthy of your confidence. Should they make a bill with you, I will be responsible for the amount.

Very respectfully, &c.,

PHILIP TURNER."

The plaintiff proved the above title to have been signed by the defendant, and to have been delivered to the plaintiff; and then offered evidence, that the *Messrs. Egertons* admitted they did make a bill with the plaintiff, on the 30th of November 1840, for \$153.92, and that one of the *Messrs. Egertons*, in the presence of the defendant, admitted the amount of the said bill, and when said guarantee was in the hands of the counsel for the plaintiff, and admitted that the same was due; that the defendant, subsequent to said conversation, called, in company with said *Egerton*, and expressed a wish that the same might be paid and settled, and at the same time certain claims were assigned to the attorney of the plaintiff, as collateral security, to pay the same and other claims against the said *Egerton*.

On the prayer of the defendant, the court rejected the above offered testimony, as not tending to show an indebtedness on the part of the defendant to the plaintiff.

There is certainly a conflict in the decisions to which we have been referred, as to the admissibility in evidence of the admissions of the party on whose account the guarantee has been made, as against the guarantor. In 5 *Binney*, 195, such declarations were admitted, but the reasons assigned by the court for such admissions, are by no means satisfactory to us. In 5 *Esp.*, 27, such admissions were rejected as evidence by *Lord Ellenborough*, and we think he has placed the rejection on legal grounds. The engagement on the part of the defendant was, to be responsible for such bill as the *Messrs. Egertons* should make, not such bill as they should acknowledge they had made. The defendant had a right to have the delivery proved in the accustomed mode, and not by hearsay evidence. The *Egertons* were witnesses, and could have been examined in the cause, to establish the delivery of the goods in question to them. If the *Egertons* were to be treated as agents, (as it is supposed they should by the case in 5 *Bin.*, 195,) in the purchase of the goods, their declarations in the making of the contract would be evidence, but it would not follow that declarations and admissions made by them, in relation to the contract, at any time thereafter, would be admissible.

Griffith vs. Turner.—1846.

On this branch of the enquiry, the court have been referred to 12 *Wheat.*, 515, *Drummond and Prestman*, and to 2 *G. & J.*, 235, *Iglehart and McCubbin*. In relation to the case of *Drummond and Prestman*, it is only necessary to say, that the peculiar form of the guarantee in that case, which made the guarantor answerable for *the conduct and all the engagements* of his son, would clearly make admissible the son's engagement, entered into by the confession of a judgment, and we accordingly find the decision of the court placed upon grounds which do not apply to the case now before the court. In the case of *Iglehart and McCubbin*, 2 *G. & J.*, 235, it was determined, that a judgment against an executor was *prima facie* evidence, in a suit on the testamentary bond against the surety: this judgment of the court may perhaps be placed on the peculiar character of the instrument by which the surety's responsibility was incurred; and upon the ground assumed by the court, as to the obligations of a surety in a testamentary bond, arising from confessions of his principal, which, it occurs to us, ought not to govern the question of the admissibility of the evidence offered in the case now under consideration.

For the reasons above expressed, we are of opinion that the declarations of the *Messrs. Egertons* were not admissible evidence in the cause.

The admissions of one of the *Messrs. Egertons*, in the presence of the defendant, we, however, apprehend should be governed by different considerations. The defendant could not, it is true, be affected by his silence in regard to such admissions, if he had no knowledge of the facts admitted by *Egerton*. If, however, he possessed such knowledge, and heard the admissions, without observation, he might justly be considered by the jury as acquiescing by his silence in the verity of such admissions. Whether he had such knowledge, was a question for the jury from the evidence in the cause; and it may be remarked, that at a time subsequent to the admission adverted to, the defendant called, in company with the said *Egerton*, and expressed a wish that the same might be paid and settled, without any intimation that the admission adverted to was untrue or inaccurate.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Hunter vs. Hatton and Kendrick.—1846.

ROBERT W. HUNTER vs. HENRY D. HATTON AND GEORGE
KENDRICK.—*December 1846.*

Irregularities and errors which occur in the progress of an equity suit, which could only be taken advantage of by the party aggrieved by them, on a rehearing, a bill of review, or on appeal in the cause in which they are found, detract nothing from the validity of the decree, when the record of such cause is presented as evidence collaterally.

Such is the nature of the irregularity in appointing commissioners, to determine whether an infant's land ought to be sold for her advantage, before her petition for sale was filed with the clerk; of the exercise of the authority by the commissioners, without the issuing of a commission to them; that the commissioners were not freeholders, or the substitution of one purchaser for another at the time of final ratification of the sale.

Where a petition showed an appropriate case for the jurisdiction of the county court, no errors or irregularities in the proceedings under it, can oust the court of the jurisdiction thus acquired, or impair, as to those who are parties and privies, the validity of its decree, when collaterally drawn in question.

Where a petition was filed by an alleged guardian and *prochein ami* of an infant, for a sale of her land, on the ground that it would be for her interest and advantage, to which she was not summoned nor made a party, the objection that the record of such a cause is not evidence against her, is not one to the jurisdiction of the court, but rests on the broad principle, that decrees and judgments are only binding on parties to the proceedings on which they are founded, and those claiming under them.

The act of 1818, chap. 133, does not repeal that part of the act of 1816, chap. 154, which requires infants to be made parties to proceedings in respect to sales of their real estates, when deemed beneficial to their interests.

The act of 1818, is only in conflict with that of 1816, in relation to the evidence to be adduced to the court to satisfy it, that the sales which it is called on to decree, would be for the interest and advantage of the infant.

The act of 1816, left the court to its ordinary mode of obtaining information as to matters of fact; but the 2nd sec. of the act of 1818, provided for the issuing of a commission to not less than three discreet and sensible men, freeholders of the county wherein the lands should lie, the sale of which is applied for.

As well now, as before the act of 1818, the infant, if a resident of the State, must be summoned to answer the petition filed by his guardian or *prochein ami*, and must appear by guardian to be appointed by the court, before the commission under the act of 1818 can rightfully issue.

The guardian of the infant, thus appearing, has a right to be heard and represented in the naming of the commissioners; in the examination of the evidence to be adduced before them, and in the action of the court upon the return of the commissioners.

Hunter vs. Hatton and Kendrick.—1846.

Proceedings in equity, filed by a guardian and *prochein ami* of an infant, to sell her lands, to which she was not summoned nor made a party, are not admissible evidence against her, or those claiming under her.

But where, after a decree for a sale, and a sale in fact, the infant, whose lands were affected, united with her husband in a petition in the cause, and made themselves parties thereto, and ratified what had been done, and called upon the court to enforce the sale, or resell the property. After ratification of the sale, and payment of the purchase money to the trustee, and conveyance of the land by the trustee to the purchaser, the husband of the infant will not be permitted to insist, that the proceedings are null and void, because of the non-summons of his wife.

In an action of trespass, *q. c. f.*, the defendants severed in their pleadings; one of them pleaded *non cul*, and *liberum tenementum*. The last plea was denied generally. The plaintiff claimed title under a decree, and as a purchaser from the trustee. The sale was made prior to 1841; ratified in July 1844; and a deed executed by trustee in September 1844. The trespass was committed and the action commenced in February 1844. **HELD**, that the plaintiff's traverse of the plea, admits the defendant's right to possession, should the jury find him entitled to the freehold; and that although the record of the decree, apart from the deed from trustee, is not, under the pleadings, admissible evidence of the *possessory right* thereunder, acquired by the plaintiff, yet when offered with such deed, is competent testimony to go to the jury, to show that the freehold is in the plaintiff.

The trustee's deed does not operate to pass the freehold merely from the time of its execution, but being a conveyance under a judicial sale, upon the principle of relation it operates retrospectively, and vests the freehold in the grantee from the date of the sale. It disproves the plea of *liberum tenementum*, by shewing, that by operation of law, at the time the trespass was committed, the freehold was in the plaintiff.

Libertum tenementum, is a plea interposed by a defendant for the purpose of trying his right to the freehold; it is not an absolute denial of all colorable right to possession by the defendant.

In an action of *t. q. c. f.*, under the general issue of not guilty, the plaintiff is not bound to rely upon the mere fact of his possession, but may also prove the legality thereof, and his title to the premises, and so entitle himself to greater damages, than a mere possessor of the land trespassed upon.

Where, under the issue joined, the only question was, whether the plaintiff had a freehold estate, parol evidence that the defendant had received from the plaintiff a balance of purchase money, for the land in controversy, and that thereupon the plaintiff had taken possession, with the consent of the defendant, who said he renounced all his claim to the land, has no tendency to prove or disprove the fact at issue.

APPEAL from *Prince George's* county court.

This was an action of *trespass q. c. f.*, brought on the 16th February 1844, by the appellant against the appellee, for a

Hunter vs. Hatton and Kendrick.—1846.

forcible entry into, and expulsion from a tract of land called *Boarmans Content*.

The defendant, *H. D. H.*, pleaded, 1st., *non cul.*

2nd. That the *locus in quo*, &c., is, and at the time was, the proper soil and freehold of the said *H. D. H.*, wherefore he entered, as it was lawful for him to do.

The defendant, *G. K.*, pleaded *non cul.*

The plaintiff joined issue on the general issue; and as to second plea of *H. D. H.*, replied, that the matters and facts therein alleged, are not true, &c.

1ST EXCEPTION. At the trial of this cause the plaintiff to maintain the issues on his part, proved that some short time before the institution of the present suit, the plaintiff was in the possession of the land and premises in the declaration mentioned, called *Boarmans Content*, claiming title to the same; and that he was engaged in the repairs of the dwelling situated on said land, on the 3rd February 1844. That during the night of that day, the said dwelling house was forcibly entered, and broken open by some person or persons, and that on the next morning, when the witnesses went to the said house, they found the defendants in the possession of the said house. That the defendants told the witnesses that they had taken possession of the said house and premises, and that they meant to keep possession. The defendants had with them, at that time, guns, and threatened to shoot the servants of the plaintiff if they came upon or crossed the said land. The said witnesses also proved, that the said defendants kept possession of the said house and premises for eight or ten days, refusing to suffer or permit the plaintiff or his servants to enter thereon.

The defendants then, for the purpose of maintaining the issues on their part joined, proved to the jury, that the said land and premises was formerly the property of *Gustavus Brown*, the deceased, father of *Mary E. Brown*, the present wife of the defendant, *Hatton*; that *Gustavus Brown* died intestate in 1830, seized of the said land, leaving *Mary E. Brown*, now the wife of the defendant *Hatton*, his only child

Hunter vs. Hatton and Kendrick.—1846.

and heir at law, who intermarried with the said defendant, *Hatton*, in the year 1838.

The plaintiff then, further to maintain the issues on his part joined, offered to prove, that after the death of the said *Gustavus Brown*, the said land was sold by a decree of *Prince George's* county court, sitting as a court of equity, as the estate and for the benefit of the said *Mary E. Brown*; and offered to prove that the same was, at that sale, purchased by one *Joseph Hatton*, who subsequently sold it to the plaintiff, and for that purpose offered to read to the jury, the following record of a decree in *Prince George's* county court, and all the proceedings therein.

That record showed, that on the 12th December 1837, *Gustavus Brown*, guardian and next friend of *Mary E. Brown*, an infant, filed a petition before the judges of *Prince George's* county court, as a court of equity, alleging, that *M. E. B.*, as the heir of *G. R. Brown* and *Mary Brown*, is entitled in fee to a tract of land called *Boarmans Content*, lying in said county; that the land has upon it a dwelling house and other out houses, which are going to ruin; that there is no timber thereon to repair or enclose it; that the whole is now waste and ruining; and that from the facts alleged, as well as the fact that the said infant is otherwise without adequate means of support, it would be for the advantage and interest of said infant that the same be sold. Prayer, for a commission to three discreet, disinterested persons, to ascertain whether or not it is for the advantage of said infant that the land should be sold; and to ascertain and report its value; and that the court would decree a sale, and take such order in the premises as may be equitable and right.

On the 21st November 1837, *Key, A. J.*, had ordered, that he commission issue, as prayed, to the commissioners recommended.

On the 10th February 1838, the commissioners, upon a certified copy of the petition and order aforesaid, to which they had appended an affidavit dated 24th January 1838, that they would execute the trust reposed in them by said commission, without favor, affection, or partiality, &c., returned,

Hunter vs. Hatton and Kendrick.—1846.

that on the 25th January 1838, they had entered on the land as named in the said commission, and after duly examining the same, in their opinion believe it to be worth about \$500, and from its situation and the ruinous condition in which it is, believed it would be for the advantage of *M. E. B.*, for the same to be sold.

On the 5th April 1838, the county court, (*STEPHEN, C. J.*, and *KEY, A. J.*,) decreed, that the land and real estate be sold at public sale, upon a credit of two years, and *Gustavus Brown* to be trustee, and to give bond, &c.

On the 4th June 1838, the trustee gave a bond which was approved.

On the 14th October 1841, *H. D. Hatton* and *Mary E.*, his wife, filed their petition, alleging, that a sale of the said land is pretended to have been made by the trustee to *Joseph Hatton*, for \$560; that such sale was not reported to the court, nor ratified. No part of the purchase money has been paid, and the trustee has departed this life; that there is no means of enforcing payment, except by a resale of the land, as the said *Joseph* is insolvent. Prayer, for a new trustee, and a resale, unless the purchaser, *Joseph*, shall pay the purchase money.

On the 23rd October 1841, *Joseph Hatton* answered said petition; insisted upon the sale to him, that he was let into possession; that he gave bond with security, for the purchase money, and afterwards sold it to *Peter D. Hatton*, who has been in possession of said lands ever since; that he, defendant, is able to pay the purchase money, and had settled with the said trustee. Prayer, for the appointment of a trustee to complete the trust and carry the decree into effect, and convey the land to *Peter D. H.*, who is willing to pay, as soon as he can get a title.

The petitioners filed a general replication to this answer, and a commission issued to take proof.

On the 19th January 1842, the county court, after proof returned, (*C. DORSEY, A. J.*,) dismissed the petition of the 12th December 1837.

Hunter vs. Hatton and Kendrick.—1846.

On the 8th July 1844, *Robert W. Hunter* filed his petition, alleging the sale to *Joseph Hatton*, and his compliance with the terms of sale; that the sale had not been finally ratified; that he was a purchaser of the land from *Joseph*; and with the consent of *Joseph*, had paid the whole of the purchase money to the complainants in this cause. Prayer, that *R. W. H.* may be substituted as purchaser for *J.*; ratification of sale; and a new trustee appointed to convey.

Upon the foregoing petition, on the 9th July 1844, the county court, (*C. DORSEY, A. J.*,) ordered and adjudged, (it appearing that this court have heretofore adjudged, that there was a sale of the premises to the said *Joseph Hatton*,) that the sale so made by the former trustee be absolutely ratified, and the said *J. H.* having sold the same to the aforesaid petitioner, it is further ordered, &c., that *Thomas F. Bowie* be appointed trustee to complete the trust, and upon satisfactory proof to him, that the said purchase money is paid, shall execute to the petitioner a conveyance of said land in fee.

The plaintiff also offered in evidence the deed of *Thomas F. Bowie*, as trustee under the decrees aforesaid, to *R. W. Hunter*, for the land decreed to be sold, bearing date 9th September 1844, duly acknowledged and recorded.

But the defendants objected to the admissibility of the said record and deed, on the ground, that no summons had ever issued against the said infant, *Mary E. Brown*; and because it did not appear by the said record, that a commission had issued to three freeholders, as required by the act of assembly; and contended before the court, that the said decree and all the proceedings thereunder, were void.

The plaintiff insisting, that said decree could not be impeached in a collateral manner; but the court (*A. C. MAGRUDER, C. J.*,) sustained the objections, and were of opinion, that the said decree was void; and that the sale made thereunder, conferred no title to the said lands upon the purchaser thereof; and refused to permit said record and deed to be read in evidence. The plaintiff excepted.

2ND EXCEPTION. After the evidence contained in the preceding bill of exceptions, which was objected to by the

Hunter vs. Hatton and Kendrick.—1846.

defendant, had been rejected by the court, the plaintiff further to maintain the issues on his part joined, called a witness, and offered to prove by him that the defendant, *Henry D. Hatton*, received from the plaintiff the balance of the purchase money for the land in the declaration mentioned, sometime in the year 1843 ; after the said *Mary E.*, the wife of the said defendant, had attained to her full age of twenty-one years; and that, thereupon the said plaintiff took possession of and entered upon the said lands, with the knowledge and consent of the said defendant, *Hatton*, and who said he renounced all his claim to said land ; but the court refused, upon the objection of the defendants, to permit the said evidence to go to the jury. To which opinion of the court, and to their refusal to suffer said evidence to go to the jury, the plaintiff excepted.

The verdict and judgment being against the plaintiff, he brought the present appeal.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, and MARTIN, J.

By T. F. BOWIE and McMAHON for the appellants, and
By TUCK and CAUSIN for the appellees.

DORSEY, J., delivered the opinion of this court.

The defendants in this case severed in pleading; *Kendrick* relying on the general issue plea of not guilty, only; and *Henry D. Hatton*, in addition to the general issue, having pleaded *liberum tenementum*. Issues were joined upon the pleas of not guilty; and to the plea of *liberum tenementum*, the replication contained nothing more than a general traverse of the facts contained in the plea.

On the trial, the plaintiff having proved his actual possession of the close on which the trespass is alleged to have been committed; and the defendant, *Hatton*, having proved a freehold interest therein, *jure uxoris*, the plaintiff offered in evidence a record of certain proceedings on the equity side of *Prince George's* county court, instituted in 1837, (whilst she was sole and an infant,) for the sale of her real estate, descended to her from her father, it being the freehold in controversy in this

Hunter vs. Hatton and Kendrick.—1846.

case; and also the deed of conveyance thereof, of the trustee to the appellant.

The admissibility of this evidence being objected to, a great variety of grounds have been relied on by the appellees in support of the objection. If the testimony were admissible for none of the purposes for which it was offered, by reason of any of the causes assigned in the court below for its rejection, or which can be urged here, then must the decision of the county court in the first bill of exceptions be sustained.

The irregularities and errors in the record produced, pervade every part of it, and are almost without number; but, with one exception, they are of such a character as to detract nothing from the validity of the decrees in the cause, when thus, collaterally, by way of evidence, presented to the court. They are irregularities and errors which could only be taken advantage of by the party aggrieved by them, on a rehearing, a bill of review, or an appeal in the cause in which they are to be found. Such is the nature of the alleged errors, in appointing commissioners before the petition, of the next friend of the infant, was filed with the clerk; of the exercise of their authority by the commissioners, without the issuing of a commission to them for that purpose; that the commissioners were not freeholders; and the substitution of the appellant, as the purchaser of the land sold, if it be an error.

The petition filed having shewn an appropriate case for the jurisdiction of the county court, no errors or irregularities in the proceedings under it, can oust the court of its jurisdiction thus acquired; or impair, as to those who are parties and privies, the validity of its decrees, when, as in the case before us, collaterally drawn in question.

The objection to the evidence offered, on the ground that the infant was not summoned, and made a party to the proceedings before the court, for the sale of her land, is not an objection to the jurisdiction of the court over the subject matter of the petition, but rests upon the broad principle, both of law and equity, that, unless in cases where it is otherwise provided by legislative enactment, decrees and judgments of courts of law and equity, are only binding on the parties to the proceed-

Hunter vs. Hatton and Kendrick.—1846.

ings on which they are founded, and those claiming under them. As against all other persons, they are *res inter alios actæ*, not binding upon, nor admissible in evidence against them, as adjudications of their rights.

In cases like that now under consideration, it is insisted, on the part of the appellant, that the legislature have, by the act of 1818, chap. 133, repealed the act of 1816, chap. 154, in respect to sales of infants' real estates, when deemed beneficial to their interests, and provided an entirely new and independent course of proceeding, in which the making of infants parties to such proceedings is wholly dispensed with. To such a constructive repeal of the express and salutary provisions of the act of 1816, requiring infants to be made parties to proceedings for the sale of their real estates, there is nothing in the language or objects of the act of 1818, that gives the slightest countenance. There is no repealing clause in it, and nothing in its provisions conflicting in the slightest degree with those of the former act, except it be in the mode by which evidence is to be adduced to the court, to satisfy it, that the sales which it is called on to decree, would be to the interest and advantage of the infants. To that extent, and no further, is it inconsistent with the act of 1816, and to the extent of such inconsistency only, can it be regarded as a repeal of any of the provisions thereof.

By the act of 1816, chap. 154, the mode of proceeding to obtain a decree for the sale of the real estates of infants, when for their interest and advantage, is fully and distinctly prescribed, except as to the manner in which it is to be made appear to the court, that the sale would be "for the interest and advantage" of the infants. In that respect the court was, consequently, left to its ordinary mode of obtaining information as to matters of fact. To change in some degree the mode of obtaining such information, and with a view to give greater protection to the rights of infants, the second section of the act of 1818, provided for the issuing of a commission to not less than three discreet and sensible men, freeholders of the county wherein the lands should lie, the sale of which is applied for. The duties of those commissioners are distinctly defined by the

Hunter vs. Hatton and Kendrick.—1846.

2nd and 3rd sections of the act of 1818. To this extent is the act of 1818, a repeal of the act of 1816, and no further. As well now as before the act of 1818, the infant, if a resident of the State, must be summoned to answer the petition filed by his guardian, or *prochein ami*, and must appear by guardian to be appointed by the court, before the commission under the act of 1818 can rightfully issue. The guardian of the infant thus appearing, has a right to be heard and represented in the naming of the commissioners; in their examination of the evidence to be adduced before them; and in the action of the court upon the return of the commissioners. To deprive them of these privileges, would be entirely inconsistent with the whole policy of our legislation, which has ever evinced an anxious desire to throw around the rights of infants, to their real estates, every necessary and salutary safeguard.

If therefore the proceedings offered in evidence, had continued to preserve the same *ex parte* character, after the first decree of the court that they bore before it, their inadmissibility as evidence against *Mary E. Hatton*, or those claiming under her, could not be doubted. But the appellants, after the first decree, having, by their petition, made themselves parties in the cause, and instead of seeking, by means of a bill of review, a reversal of the decree, and a correction of the errors in the proceedings, which had taken place, recognized, ratified and confirmed what had been done, and called upon the court to require the purchaser of the land sold under the decree, within a day to be named by the court, to bring the purchase money into court, or that a resale of the property might be made. After such a proceeding, and after a ratification of the sale, and payment to him of the whole purchase money, and a conveyance of the land by the trustee to the purchaser, does it lie in the mouth of *Henry D. Hatton* to say, that the whole proceedings are null and void, because, at their incipiency, *Mary E. Hatton* was not summoned and made to appear, as directed by the act of 1816? By his petition to the court and receipt of the purchase money, he waived all objection, to the irregularity of which he now complains, and should be estopped from asserting it, either at law or in equity.

Hunter vs. Hatton and Kendrick.—1846.

But it is alleged, that the conveyance, by the trustee to the purchaser, being several months posterior to the trespass for which the present action was brought, that although it were conceded that the appellant was rightfully possessed of the land, and entitled to hold such possession adversely to the appellee, *Hatton*, the owner of the freehold, yet, that in the present state of the pleadings, such right of possession in the appellant, formed no part of the issue on the plea of *liberum tenementum*: and, therefore, upon the issue joined thereon, no evidence could be admitted to prove such mere right of possession in the appellant; that if intended as an answer to the plea of *liberum tenementum*, it should have been specially pleaded by way of replication. And when regarding the title of the appellant as a mere right of possession, the objection to the admissibility of the record offered in evidence should have been sustained. *Liberum tenementum* is a plea interposed by a defendant, for the purpose of trying his right to the freehold; it is not an absolute denial of all colorable right to possession by the defendant.

The opinion of *Lord Denman, C. J.*, in *Doe vs. Wright*, 37 *Eng. C. L. R.*, 231, does not, as has been asserted, clearly shew, that upon the issue joined in this case on the plea of *liberum tenementum*, the superior possessory right of the appellant can be given in evidence. His lordship says, “it is necessary to settle what is the true meaning of *liberum tenementum*: what it admits, and what it denies. Now it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would be bad, as amounting to the general issue. It must admit such a possession as would suffice to maintain the action if unanswered, or as against a wrong doer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action. In the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant, with a right to immediate possession. In an ordinary case, therefore, such a plea is answered, by replying a term of years in the plaintiff created by the defendant: which shews that the plaintiff’s possession is not merely colorable but rightful.” Such a replication admits the freehold in the

Hunter vs. Hatton and Kendrick.—1846.

defendant, and only asserts a right of possession in the plaintiff. On an issue upon such a replication, the question to be tried by the jury would be the plaintiff's right of possession. But what is the matter to be tried under the issue in this case, on the plea of *liberum tenementum*? Whether the freehold be in the defendant? The jury, upon finding that fact, have nothing to do with the right of possession. The plaintiff's traverse of the plea, admits the defendant's right to the possession, should the jury find him entitled to the freehold. These views, it is believed, are sustained by *Thompson vs. Hardinge*, 50 Eng. C. L. R., 940, where *Maule, J.*, says, "the plea of *liberum tenementum*, does not assert a freehold interest only, but present freehold, a right of immediate possession as against any other freehold." And *Coltman, J.*, who delivered the opinion of the court in that case, said, "we are of opinion, that if the freehold is in the lord, the tenant's interest must be of a subordinate nature, and must be replied, on the same principle on which a term of years must be pleaded in answer to a plea of *liberum tenementum*." And in 1 *Chit. Pl.*, 503, it is thus stated: "In observing upon the qualities of pleas, we shall hereafter see that a special plea in trespass, which claims for the defendant a possessory right, and yet does not give the plaintiff express color, is bad, because it amounts to the general issue, and violates the principle that a plea must deny or confess, and avoid the matter alleged in the declaration. A plea of *liberum tenementum*, is free from this objection, because it gives apparent color, as it is not absolutely and manifestly inconsistent therewith, that the plaintiff might have had some inferior leasehold or minor title, in respect whereof he might have had possessory right or title, or at least, possession." And in treating of the plea of *liberum tenementum*, it is stated: "thus if the defendant be in reality the freeholder, so that the plaintiff cannot with safety deny the plea, he is driven to admit its truth, and to deduce a title from the defendant, as that he demised the close to the plaintiff," &c. And in page 595, "if the plaintiff derive title under the defendant, then he must not traverse his plea; but confessing the defendant's title, must reply the lease, or some other title under him, concluding with a verification."

Hunter vs. Hatton and Kendrick.—1846.

But although the record, apart from the deed of conveyance by the trustee, is not under the pleadings in this cause, admissible in evidence of the possessory right thereunder acquired by the plaintiff; yet when offered with such deed of conveyance, it is competent testimony to go to the jury to shew, that the freehold, in the premises in question, is not in the defendant, but in the plaintiff. It is true, the present action was instituted on the 16th day of February 1844, a few days after the commission of the trespass complained of; and that the deed of conveyance from the trustee to the appellant, bears date on the ninth day of September, of the same year: some months after both the cause and commencement of the present action. This deed, however, does not operate to pass the freehold, merely from the time of its execution; but being a conveyance under a judicial sale, upon the principles of relation, it operates retrospectively, and vests the freehold estate in the premises, in the grantee from the date of the sale; and therefore disproves and defeats the plea of *liberum tenementum*, by shewing that, by operation of law, at the time the trespass was committed, the freehold was in the plaintiff. See *Viner's Abr., tit., Relation*, 290, and *Jackson vs. Ramsay*, 3 Cowen, 75, and the cases therein referred to.

It hence follows that the county court erred, in refusing to permit the record and deed offered in evidence, in the first bill of exceptions, to be read to the jury.

The court below did not err in refusing to permit the plaintiff, as against *Henry D. Hatton*, to give to the jury the testimony offered in the second bill of exceptions. The issue to be tried by the jury was, whether he, *Hatton*, had the freehold estate in the land in controversy. The testimony rejected, had no tendency to prove or disprove that fact. No such oral proof could transfer an estate in freehold, upon the plaintiff. It was therefore, as against *Hatton*, inadmissible under the issues in the cause. If the defendant, *Hatton*, had been the plaintiff in this suit, having sued *Hunter*, as a trespasser by reason of his entry on the plaintiff's freehold, under the circumstances in which it was made, as shewn by the testimony offered; the court would have held the plaintiff estopped, on the ground of

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

fraud, from denying the legality of the defendants entry, and from any recovery of damages on account thereof.

In what has been said of the decisions of the county court on the admissibility of the testimony offered in the two bills of exceptions, the remarks made were intended only to apply to *Henry D. Hatton*, and in reference to the issue joined upon his plea of *liberum tenementum*. As respects the defendant, *Kendrick*, whose only defence to the action was *non cul*, the testimony offered and rejected in both bills of exceptions ought to have been admitted. The plaintiff, to entitle himself to recover, was not bound to rely upon the mere fact of his possession, but might prove the legality thereof and his title to the premises. The damages which a jury would give to a plaintiff, a mere possessor, who exhibited neither evidence of title or right to possession, would, it is presumed, be very different in amount from those which would be given to a plaintiff whose possession was shewn to be rightful, his title undeniable.

There being, it is conceived, error in the decisions of the county court in both bills of exceptions, their judgment is reversed and a procedendo awarded.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JAMES MCCALL, ET AL., vs. HINKLEY AND WOODWARD,
GARNISHEES OF CAREY, ET AL.—*December 1846.*

A deed from the several partners of a firm in failing circumstances, for a nominal consideration, conveyed all their effects to trustees in trust :

- 1st. To take possession of and recover such estate; give acquittances, and compound and arbitrate all debts assigned; appoint agents and substitutes, and sell the estate recovered.
- 2nd. To pay and discharge the expenses of the trust.
- 3rd. To pay and satisfy a certain judgment mentioned in the deed against one of the partners, for a debt due by the firm in *New York*.
- 4th. To pay and satisfy all the small debts of the firm, under the sum of one hundred dollars.
- 5th. To pay the whole of the residue of the estate recovered, or so much thereof as might be necessary, to and amongst such of the creditors of the firm as should, within ninety days of the date of the deed, signify their

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

assent to the terms thereof, and execute and deliver to the grantors a full and final release and discharge of and from all claims, in manner following, to wit: 25 per cent. on account of merchandize purchased; then 25 per cent. on account of borrowed money and accommodation paper, and other confidential engagements of the firm; then the balance, principal and interest, of the releasing creditor's claims.

6th. If the funds prove more than sufficient for the above objects, the residue to be paid to the grantors.

Upon the prayer that the said deed is void in law, in that it gives an undue preference to one class of creditors, and requires all creditors who may partake of its benefits, to execute a general release to the grantor's debtors. The county court declared the deed to be valid; upon appeal, affirmed by a divided court.

APPEAL from *Baltimore* county court.

On the 22nd March 1841, the appellants sued out an attachment upon a judgment of that court, rendered in their favor, against *Carey, Wethered, and O'Donnell*.

The attachment was laid in the hands of the garnishees, who appeared and pleaded *nulla bona*, on which plea issue was joined.

EXCEPTION. At the trial of the cause the plaintiffs to support the issue on their part, offered in evidence the judgment rendered in this court on the 30th September 1840, as contained in the writ, and proved that the attachment in this case was issued on the 21st March 1841, and laid in the hands of *Edward Hinkley*, one of the garnishees in this case, on the 1st April 1841, and in the hands of *William Woodward*, the other of said garnishees, on the 7th of the same month; and that said garnishees had in their hands funds collected by them, as trustees, under and by virtue of a certain deed of trust, executed to them by the said *Carey, Wethered & Co.*, and delivered to, and accepted by, said trustees, on or about the day of its date, which deed is as follows:—

“This indenture, made this 24th September 1840, between *George Carey, George Y. Wethered, and John H. O'Donnell*, now, or late partners, trading under the firm of *Carey, Wethered and Company*, all of the city and county of *Baltimore*, of the first part, and *W. W. and E. H.*, of the same place, of the second part, witnesseth, that the said parties of the first part, partners as aforesaid, for and in consideration of the

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

sum of *ten dollars*, lawful money of the *United States*, to them in hand paid by the said parties of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged; and also for divers good causes, and other valuable considerations, them thereunto moving, have granted, bargained, &c., and do hereby grant, bargain, &c., unto the said parties of the second part, as joint tenants, all and singular, the real and personal estate, goods, &c.; of debts, claims and sums of money, due, payable or owing to the said *C. & W. Co.*, and the late firm of *C. & W.*, or to said firms, or either of them, in any wise coming, and all bonds, notes, vouchers, evidences and writings, touching and concerning the same; and all the right, title, interest, claim, demand, power and control whatsoever, of said parties of the first part, and each and every of them, of, in, unto, and out of, and over the same, to have and to hold, receive and take the same, and every part thereof, unto the said parties hereto of the second part; and the survivor of them, and the heirs, executors, administrators and assigns of such survivor; to execute the powers and trusts hereby intended to be reposed in them, the said parties of the first part have constituted and appointed, and by these presents do constitute and appoint the said parties of the second part, and the survivor of them, and the legal representatives of such survivor, to be the true and lawful attorneys, irrevocable of the said parties of the first part, and in their names, or in the name or names of any of them, or otherwise, as the case may require; but to the uses and purposes hereinafter declared, to collect, and by all lawful ways and means whatever, recover, receive, and get into the hands, custody and power of the said parties of the second part, all and singular, the estate, property, debts and claims, hereby conveyed and assigned, and every part thereof; and upon recovery and receipt thereof, good and sufficient acquittances and discharges therefor, in whole or in part, as the case may be, to give execute and deliver, and to compound for and settle, by arbitration or otherwise, all debts and claims so hereby assigned, or any part thereof, in such manner as the said trustees or trustee, and attorneys or attorney, shall think proper; and for all and every the purposes aforesaid,

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

one or more attorney or attorneys under them, the said trustees to substitute and appoint, and such appointment at pleasure to revoke, and reasonable compensation to such substitute or substitutes, to allow, and generally to do, perform and transact, all and whatsoever may be requisite in the premises, as fully and effectually as the said parties of the first part, or any of them, could or might do personally, if these presents had never been made; the said parties of the first part, and each of them, hereby agreeing, and binding themselves and himself, to ratify and confirm whatsoever the said parties of the second part, or the survivor of them, or the legal representatives of such survivor, shall or may lawfully do, or cause to be done, in the matters aforesaid, by virtue hereof, in trust and confidence nevertheless, and to, for, and upon the uses and trusts, and to the ends, intents and purposes, and under and subject to the powers, provisos, limitations, declarations and agreements, hereinafter mentioned, expressed and declared, of and concerning the said estate and property, and other the premises hereby granted and assigned; that is to say, in trust, that the said trustee shall and will, as soon as conveniently may be, dispose of the said estate and property hereby conveyed, by sale of the same, (which sale the said trustees or trustee, are, and is hereby authorised and empowered, to make, whenever, and in such manner as they or he shall think best and proper,) and collect the debts and claims hereby assigned and transferred, wherever the same may be; and upon the further trust, that the said trustees, or the survivor of them, or the legal representatives of the survivor, shall and will pay, apply and dispose of all the moneys that may be received or come to the hands of them, or either of them, or the legal representatives of the survivor of them, in manner following, that is to say: in the first place, may deduct therefrom the expenses attending the execution of this trust, including five per cent. commission to the trustees, and counsel and attorney's fees; in the second place, shall thereout pay and satisfy a certain judgment obtained in the city of *New York*, in the State of *New York*, by *Bankard and Hutton*, of said city, against said *George Carey*, for a debt due by said *Carey, Wethered and Company*, to said *B. & H.*,

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

on and for which the said *Carey* was, in July or August last, arrested by said plaintiffs in *New York*, aforesaid; on which arrest *John Coster*, of *Brooklyn*, State of *New York*, became bail for said *Carey*; and in case the said bail *Coster* has paid, or shall be compelled to pay and satisfy such judgment, then to pay and satisfy, and indemnify the said *Coster* therefor, in lieu of paying said plaintiffs as aforesaid; in the third place, shall pay and satisfy all the small debts of said *C., W. & Co.*, of or under the sum of one hundred dollars, and after such deduction shall, in the next place, pay and appropriate the whole of the residue of such money, or so much thereof as may be necessary, to and amongst such of the creditors of the said *C., W. & Co.*, as shall within ninety days from the date of this deed, signify their assent to the terms of this deed, and execute and deliver to the said parties of the first part, a full and final release and discharge, of and from all claims or demands, to the time of executing these presents, in manner following, that is to say, shall out of such residue, first, pay twenty-five per centum of the principal money of the debts due or owing to such creditor, so releasing as aforesaid, for goods and merchandise purchased by said *C., W. & Co.*; and after such payment of twenty-five per cent., shall then pay to such creditor, so releasing as aforesaid, all borrowed money, accommodation notes, accommodation endorsements, and other confidential engagements of said *C., W. & Co.*, to such creditors, so releasing as aforesaid, in full of principal and interest; and then out of the balance remaining, to pay in full, for principal and interest, the balances due and owing to such creditors, so releasing as aforesaid, for goods and merchandise purchased by said *C., W. & Co.*, if the fund be sufficient therefor; but rateably and proportionally in the order aforesaid, if the fund be not sufficient to discharge the whole; and after the full satisfaction and discharge of all the foregoing claims, and all interest thereon, out of the residue, if any, shall pay all other creditors of said *C., W. & Co.*, in full, or in equal proportions, if the said residue be not sufficient to pay such other creditors in full; and in the last place, shall pay over the balance or surplus, if any, to the said parties of the first part, or their respective legal representatives, pro-

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

vided, that neither the said trustees, nor their representatives, shall in any manner be answerable for the acts of the other, but for his individual acts only; nor be accountable for any loss or diminution of said trust estate, except so far as the same may come to their hands respectively, or be lost by their or his wilful neglect. In testimony whereof, the said *George Carey, George Y. Wethered*, and *John H. O'Donnell*, have hereunto respectively set their hands and affixed their seals, on the day and year first herein written. GEO. CAREY, (Seal.)

GEO. Y. WETHERED, (Seal.)

J. H. O'DONNELL, (Seal.) "

This deed was regularly acknowledged and recorded in *Baltimore* county court.

The garnishees further to support the issue on their part, and to sustain said deed of trust as a *bona fide* and valid conveyance, gave in evidence by *George Carey*, a competent witness, that prior to the execution of said deed of trust, there were two or three meetings of creditors of said *C., W. & Co.*, held in the city of *Baltimore*, the first of which was held in the month of May, and the others in the summer, probably in July 1840. At the first meeting *C., W. & Co.*, made a proposition to pay, first, all borrowed money, and then, the residue to all other creditors; the plaintiffs never attended any of these meetings, or assented to said deed of trust. To this proposition some creditors objected; and at the second meeting another proposition was made, that had been suggested by some of the creditors, in the interval between the first and second meeting. This second proposition was in accordance with the terms expressed in the said deed of trust, and many of the creditors, at the second meeting, assented to the form of the deed, and signified that they would sign the release as therein required; and most of all the creditors did execute such release, within the period of ninety days after the execution of said deed of trust; and the garnishees then read in evidence the release so executed. "To all to whom these presents shall come: we," &c.

The garnishees further gave in evidence by said witness, *Carey*, that immediately after the execution of said deed of

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

trust, the said trustees took possession of the books, notes, bills and accounts of the said *C., W. & Co.* That the said firm owed, altogether, about one hundred and ten thousand dollars: forty or fifty thousand of which amount had been secured before the said deed of trust was executed. The claims of creditors who did not execute the release, including the plaintiffs, (who refused within the ninety days to execute it,) amount to about ten thousand dollars. The trustees in said deed were appointed at the suggestion of *William E. Mayhew* and *Robert A. Taylor*, who were creditors, at a meeting of the creditors, which was numerously attended by creditors of both classes, business and confidential. That the said firm had no goods or merchandise when the said deed was executed. It had bills receivable and debts due on open account, chiefly from persons resident in the western country, including *Virginia* and *Tennessee*. That the said firm stopped payment in February 1840; that it never transacted any business after the execution of said deed of trust; neither of the partners had any individual property at the date of said deed of trust. That the said *C., W. & O'D.*, all applied for the benefit of the insolvent laws of *Maryland*, *Carey* on the 12th January 1841, *Wethered* on the 7th August in the same year, and *O'Donnell* on 13th July 1841, and each of them obtained a final discharge upon such application. That no permanent trustee has been appointed upon such application.

The plaintiffs prayed the opinion and direction of the court to the jury, that the plaintiffs are entitled to recover in this attachment, notwithstanding the said deed of trust and releases given in pursuance thereof; and that said deed of trust is void in law, in that it gives an undue preference to one class of creditors, and requires all creditors who may partake of its benefits, to execute a general release to the debtor, *Carey, Wethered & Co.*, or for other reasons; which opinion and direction the county court, (*PURVIANCE, A. J.*) refused to give, and declared that the said deed of trust was valid. The plaintiffs excepted.

The plaintiffs prosecuted this appeal.

The cause was argued before *DORSEY, CHAMBERS, MAGRUDER* and *MARTIN, J.*

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

By MEREDITH for the appellants, and
By HINCKLEY for the appellees.

DORSEY, J., delivered his opinion, as follows :

The only question designed to be decided by this opinion, is that which arises on the deed of the 24th of September 1840, from *Carey, Wethered and O'Donnell*, to *Edward Hinkley and William Woodward*, whereby the grantors, being unable to pay their debts, and in failing circumstances, (in other words insolvent debtors,) conveyed all their property to the grantees, in trust, to sell and dispose of the same, and to apply the proceeds thereof, after deducting the expenses incident to the trust, to the full satisfaction and payment of the claims of certain enumerated creditors of the grantors; and, “in the next place, to pay and appropriate the whole of the residue of such money, or so much thereof as may be necessary, to and amongst such of the creditors of the said *Carey, Wethered and Company*, as shall, within ninety days from the date of this deed, signify their assent to the terms thereof, and execute and deliver to the said parties of the first part, (that is, the grantors,) a full and final release, and discharge, of and from all claims and demands, to the time of executing these presents, &c., and after the full satisfaction and discharge of all the foregoing claims, and all interest thereon, out of the residue, if any, shall pay all other creditors of said *Carey, Wethered and Company*.”

Whether an assignment, made by a debtor in insolvent circumstances, of all his property, for the benefit of all his creditors, with a proviso, that each creditor assenting to receive a dividend under such conveyance, shall, within some specified reasonable time, release the debtor from his claim against him, is fraudulent and void, under the 13 of *Eliz.*, chap. 5, is a question on which, in the examination of the case before us, it is not intended to express any opinion. Believing that, even if the validity of such an assignment were conceded, such a concession would fall far short of removing the fraudulent imputations cast upon the assignment under our consideration.

Before proceeding to an examination of the authorities referred to, as bearing upon this subject, let us see how the case

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

would stand upon the broad principles of morality, law, and justice, apart from all adjudications, or expressions of opinion by courts of justice, or eminent jurists. And, first, what are the obligations imposed on the debtor, and what the rights conferred on the creditor, by the character in which they respectively stand to each other? Upon principles of morality, law and justice, debtors are bound to apply their present property, and their future earnings and acquirements, to the payment of their just debts; and creditors, upon the clearest principles of natural justice, and of law, (irrespective of our insolvent system,) have a right to pursue such property, earnings, and acquirements, until their claims be fully satisfied and paid. Of this inherent right of the creditor, unless relinquished by his consent, the debtor has no right to deprive him. All unjust and indirect means, used by a debtor, to extort from his creditor a surrender of such, his rights; all physical or moral coercion, resorted to by the debtor, to effect such a purpose, are fraudulent, as well at common law, as under the statute of *Eliz.*, against creditors, who, withholding their assent to such proceedings, are injured thereby. What is the nature? what was the design of the assignment before us? The answer is so unequivocally apparent upon its face, as to leave not a moment's doubt upon the subject in the mind of him who reads it. Its object was, by a species of moral duress, by indirect means, by a violation of the principles of natural justice and right, to place a portion of the creditors in a condition, whereby they were to be compelled to relinquish all claim to any part of the present property of their debtor, or to surrender all right to seek payment out of his future earnings and acquirements. The injustice and impropriety of such an effort, on the part of the debtor, must shock the moral sense of every man, and its fraudulent design and effects, in legal contemplation, upon the rights of those creditors who refuse to accede to its terms, cannot, by argument or illustration, be made more obvious.

It was admitted, in the discussion of this case, (and such is the principle established by a current of authorities,) that, if the assignment contain but a part of the property of the debtor; or if, before the full payment of the entire claims of the credi-

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

tors, any part of the property assigned be reserved to the debtor, such an assignment is fraudulent and void. Void against whom? Not against the creditors, who, knowing its provisions, have assented thereto, and released their claims. But void as against dissenting creditors. But why fraudulent and void as to them? Is the injustice visited upon them? Is the detriment to which they are subjected?—is the fraudulent hindrance and delay in the recovery of their claims, greater? Nay, are they not much less under such assignments, than they are under that, now for our consideration? Sanction the validity of the present assignment, and it is a fact conceded in this cause, and is practically true, as to almost every assignment containing a provision similar to that which forms the subject matter of the present controversy, that the dissenting creditors are utterly excluded from all participation in any part of the debtor's property owned at the time of the assignment. But what is the fraudulent injury sustained by a dissenting creditor in the aforementioned cases, in which the assignments are adjudged and admitted to be fraudulent, as against him? Unquestionably less than in the case now before us. He, in those cases, is left in the full enjoyment of his right to recover his claim out of the unassigned portion of his debtor's property, or out of that part of the property assigned, which was reserved to the debtor. And, yet, in *Massachusetts*, and, it is believed, everywhere else, where such assignments have been submitted to the cognizance of judicial tribunals, in reference to the statute of *Elizabeth*, they have been held fraudulent and void, as against dissenting creditors.

Assuming, then, as against dissentient creditors, the invalidity of the assignments, by reason of the requisition of releases from creditors, in those cases where but a part of the debtor's property is conveyed for the benefit of creditors, upon what possible ground can it be contended, that, as concerns dissenting creditors, assignments of the whole of the debtor's property, with such stipulations for releases, are not fraudulent and void? Is the nature of the transaction changed? Is it purified by the fact, that, in the latter case, the noncurring creditor is deprived of the whole of his debtor's property? whereas, in the former

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

case, he is only deprived of a part. Yet, to this result, you must necessarily arrive to draw a distinction between the two cases, favorably to the latter. If the extent of the wrong and injury sustained by the suffering party, could in anywise affect the nature and character of the transaction, it is surely much greater in such latter than in the former case. And it should be borne in mind, that, in most, if not all of the cases in which has been adjudged the invalidity of assignments of part of the debtor's property, with stipulations for releases by creditors receiving dividends under such deeds, all the property conveyed was not given to the assenting creditors, but their just dividends only. In those cases, therefore, there did not exist that strongest of all the *indicia* of legal fraud in such cases, and which exists in this case, to wit, a provision to operate, by way of fraudulent moral compulsion on the creditors, by which they are notified by their debtor, in language too plain to be misunderstood, that, willing or not willing, they must surrender rights secured to them by contract, law, and justice, or be excluded from all participation in the property owned by the debtor at the time of the assignment. To sustain the deed now under consideration, is to declare that such conduct of the debtor is free from all illegality or fraud towards dissenting creditors.

If the assenting creditors were the parties seeking to vacate an assignment, transferring only a portion of the debtor's property, because it did not embrace the whole of it; such application would not be unsupported, by, at least, some show of reason and justice. But that a dissenting creditor should successfully assert, in a court of justice, the invalidity of an assignment, depriving him of only part of his debtor's property; and that he is entitled to no relief, where he is, by a like conveyance, deprived of all claim to any portion of his debtor's property, is certainly an anomaly in judicial proceedings; and rests upon reasons or principles, far beyond the ken of ordinary human intellects, nor can the distinction be satisfactorily accounted for upon any legitimate system of reasoning, which announces the validity, as against dissenting creditors, of an assignment of all a debtor's present property, with a stipulation for releases by creditors; and the invalidity of an assignment of

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

part of a debtor's property, with a stipulation for like releases. In contemplation of law, the fraudulent character of each instrument is the same: they differ only in the extent of the injury attempted to be inflicted by the fraudulent act of assignment.

Why is it that the assignments referred to, of a part of a debtor's property, or of the whole, with a reservation of a part, or some interest therein, to the debtors, with a stipulation for releases by creditors before their claims are fully paid, are held fraudulent and void as against dissenting creditors? It is because the creditor is required to release his entire debt, for but a dividend thereof; whilst the debtor is to be left in the full enjoyment of a portion of that, which, by the tenor of his contract, and the law of the land, ought to be applied to the payment of his debts. What is it, that was attempted to be effected by the assignment before us? Nothing more nor less than, by a partial payment, to obtain a full release; and to leave the debtor to the enjoyment of his future earnings and acquisitions, which, by the terms of his contract, and the law of the land, he was as much bound to apply to the payment of his debts, as he was the "reserved interest or portion" of his, then, property. The assignment before us further contains this pregnant and conclusive evidence of a legally fraudulent intention, the announcement made to his creditors, by the execution of the assignment, that unless they assented to the terms thereof, they should be forever debarred from all interest in the property conveyed. The legal intendment of a fraudulent design, in each of the three cases, manifestly appears upon the face of the assignments:—It is to coerce the creditors to surrender their rights, upon the terms of injustice the debtor has seen fit to prescribe. Unless immorality be morality, and wrong and right be convertible terms, human ingenuity can make no discrimination in the legal character of the three transactions: and certainly not favorably to the last of the three cases. As well might it be contended, that, because in grand and petty larceny, the gain by the offenders, and the loss by the offended, is greater in the one case than in the other, they are not both larcenies. That in legal contemplation, they are entirely different: the one being right, and the other wrong.

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

In some of the *United States*, it has been determined, that if a debtor in failing circumstances, make an assignment of all his property, for the benefit of all his creditors, with a proviso, that each creditor on receiving his dividend shall release all claims against the debtor, such an assignment is fraudulent and void, as regards a dissenting creditor. And yet, how much less cause to complain has such a creditor, than the present appellants. There the dividend, designed to be applicable to the claim of a creditor, who is debarred from receiving it by reason of his rejection of the terms proffered by the assignment, by way of resulting trust, becomes the property of the debtor; and as such, may by law be made available to the payment of such creditor's claim, so that in effect he might receive, in common with all other creditors, his just proportion of the effects of his debtor.

As a circumstance shewing that nothing fraudulent was intended, we are referred to that part of the deed which provides, that after the full satisfaction and discharge of the claims of the creditors previously provided for, the residue, if any, shall be applied to the payment of the claims of all other creditors. This provision, regarding it in reference to all past experience, in relation to such conveyances, is rather a mockery, than a *bona fide* offer of any substantial benefit to dissenting creditors. The history of such conveyances, almost, if not altogether, without an exception, as might well be supposed, proves, that before the expiration of the limited period, creditors enough will be found assenting to the terms of the conveyance, to exhaust all the property assigned. And that such was the result in this case, was admitted by the appellee. And that such was the anticipation of the debtors, in executing this assignment, is manifest from the stringent provision it contains, in respect to the releases of creditors.

The provision of this assignment, as concerns releases by creditors, has been attempted to be justified as being nothing more than the giving of preferences to particular creditors, which, by the acknowledged principles of law, every debtor has a right to give. This provision cannot be supported on that ground. A debtor may, by a transfer of property, prefer

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

one creditor, or class of creditors, to another: but it must be done *bona fide*, for the purpose of conferring a benefit on the creditor; not of securing a benefit to the debtor. The privileges cannot be exerted, as in this case, as a device contrived for the purpose of obtaining a benefit to the debtor, by imposing on his creditors, what, in law, cannot be otherwise regarded, than as a fraudulent moral coercion, practised upon them, to induce an unwilling surrender to him of their just rights.

To sanction such a deed as this, would be to annihilate the just and salutary principles of the insolvent laws, in almost every instance, in respect to all insolvents who are possessed of property to any considerable extent. Every such debtor will dictate his own terms to his creditors, and make for himself his own insolvent law. Let it be once announced that courts of justice will sustain such conveyances, and thenceforth there will be no dissenting creditors. All your numerous acts of legislation, designed to prevent and vacate undue preferences and to secure the equal distribution of the estates of insolvents, amongst all their creditors, will be virtually repealed. There will be no dissentient creditor, who, driving the debtor to petition for an insolvent's discharge, will, through his trustee, seek to vacate such a conveyance. But suppose a creditor, indignant at the insult and injustice with which he had been treated, should refuse to accede to the terms of the assignment, and having driven the debtor to seek the benefit of the insolvent laws, should call on the trustee to proceed in a court of law or equity, to vacate such a conveyance: what imaginable benefit could he anticipate from such a proceeding? The trustee receiving nothing from the insolvent's estate, the creditor must secure, or advance to him, all the expenses of the litigation. And what must be the, almost, inevitable result of such a controversy?—Why, the debtor will appear in court, and swear, as well he might, that he expected all his creditors would have come in under the assignment; and that, at the time of executing the same, he had no intent or expectation of being or becoming an insolvent petitioner. The necessary consequence of which would be, that the trustee is dismissed from court, and the dissenting creditor must pay all the expenses of the fruitless litigation.

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

By giving validity to such deeds as that now before us, an unjust and odious discrimination, in the inverse ratio of their merits, is created between two classes of insolvent debtors. The one having property, and withholding it from their creditors as long as the law's delays will allow: the other honestly appropriating their means and earnings to the payment of their just debts, are ultimately driven to the necessity of becoming insolvent petitioners, with little or nothing to surrender for the benefit of their creditors. The former class are virtually permitted, severally, to pass insolvent laws for themselves; to prescribe the terms of their own discharges, and to exempt from the pursuit of their creditors their subsequent acquirements, by gift, devise, descent, or in the course of distribution. Whilst the latter, and more meritorious class, can only obtain their discharges under the general insolvent laws of the State, and must leave, subject to the claims of their creditors, whatever they may subsequently acquire by way of gift, devise, descent, or in the course of distribution.

But it is urged, that conveyances like the present have been so long used, and have been of such frequent occurrence in this State, without objection, that to shake their validity would be productive of most mischievous consequences. Without stopping to enquire, whether such assignments are not much less numerous?—their results much less serious in reality, than in imagination?—whether the statute of repose, as it is called, be not an adequate remedy for most of the apprehended mischiefs?—whether the frequent occurrence, (if it be so,) of such assignments, without objection, results not rather from the fact that all the creditors assented thereto, than from any acquiescence, by dissenting creditors, in the validity thereof?—can any precedents be found, where courts of justice, for such a reason, have sanctioned proceedings which have been concocted in fraud, and are in direct violation of the statute law of the land? It is believed not. Due respect and indulgence have been shewn to popular errors, in the adoption of the trite maxim, that “*communis error facit jus.*” But that axiom has never been applied to a case like the present, and he would be a bold jurist, and the advocate of a new code of morality, who

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

would assert, that “*communis fraus et violatio legis faciunt jus.*” And to that length must the maxim be extended, to support the conveyance, the validity of which is based upon it. That a model of such an assignment as that now before us, could have been substituted for the old and common form of a deed of composition, is strange indeed. And it can only be accounted for, by supposing it to be, the cunningly devised invention of him, who, in stretching his ingenuity to rescue the debtor from the power and rights of the creditor, lost sight of the principles both of law and morality. Common usage or custom may explain or change the nature of a contract; or the liabilities or rights of the parties thereto. But no such custom is of any validity; it being in its origin and character, unjust and unreasonable, and in contravention of the statutory enactment on the subject.

Having thus far endeavored to shew what ought to be the decision of this case, upon the general principles of reason, law, and justice, applicable to its determination, let us next enquire how far the results, which have been thence obtained, are controlled by the authorities upon the subject. And first let us examine the adjudications in *England*, relied on in the argument for the appellee, as decisions of the question before us. But two of them have any bearing upon it. The first is that of *Pickstock vs. Lysters*, 3 *Maule and Selw.*, 371, where a debtor being in insolvent circumstances, to prevent one creditor from laying an execution upon it, conveyed all his property by a general assignment, to trustees, for the benefit of all his creditors, without giving any preference to any one of them; or imposing any condition, by which any creditor was to be excluded from an equal participation with other creditors, under the deed. In that case *Lord Ellenborough* says: “the act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors. * * * I see no fraud; the deed was for the fair purpose of distribution.” And *Bayley, Justice*, in delivering his opinion, says: “and this creditor is not excluded by the deed; but will stand, to all intents and purposes, in the same situation with all the rest of the creditors.” *La Blanc, Justice*, says:

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

“this was not a deed, by which the party stipulated for a *benefit* to himself; but all the property of the party is fairly to be distributed amongst his creditors.” The design and operation of the assignment in *Pickstock vs. Lyster*, being wholly dissimilar, the judgment of the court upon it, can give no sanction to the conveyance before us; but, according to the reasoning of the judges, is a clear authority against it.

The remaining case is that of *The King vs. Watson and another*, 1 *Exchequer Rep.*, 265, where, upon demurrer, the question did properly arise, whether an assignment of all the property of *Wheeler*, an insolvent debtor, in trust for the benefit of all his creditors, with a proviso, “that in consideration of such assignment they should take the same, and the moneys to arise therefrom, in full satisfaction and discharge of their several and respective debts, then due and owing to them, and release the said *Wheeler* therefrom,” was fraudulent? In favor of the demurrer, that is, of the validity of such an assignment, *Pickstock vs. Lyster* was the only case referred to by the counsel: in which case it appears, that the assignment was general, for the benefit of all the creditors; and without any stipulation or provision therein, for the release of the debtor from the claims of all creditors receiving their distributive portions of the trust funds. By such an assignment as that, no fraud or injustice was done to any of the creditors, they being required to surrender no right, and the debtor reserving nothing to himself; no benefit not conferred on him by the most extended construction of his legal liabilities. The counsel opposed to the demurrer, and asserting the invalidity of the deed, in *The King vs. Watson and another*, does, it is true, say, that the assignment was fraudulent under the statute of 13 *Eliz.*, “from the fact of there being inserted in the assignment, a condition, to be imposed on all, who should entitle themselves to benefit under it, by signing it, that they should release the debtor from the rest of their demands, in consideration of such dividend as they should receive.” That, therefore, if the deed was not *ipso facto*, void, it was voidable by him as delaying the recovery of his debt; and also operating to compel him to accede to a composition, which the bankrupt

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

laws could not force him to submit to;" and, "that the non-assent of some of the creditors to a deed of assignment, renders it fraudulent and void, was decided in *Eckardt vs. Wilson*, 8 *T. R.*, 148." As to which, *Baron Graham* observed, "in that case there was an actual commission of bankrupt taken out." After such a mere statement of points, (for argument it can scarcely be called,) the opinion of the court is thus laconically delivered: "There is certainly no fraud in this case, affecting the assignment which has been made for the equal benefit of all the creditors, *Braddock*, as well as the rest. Nor is any such inference to be drawn from the facts averred in the replication. It would have been a different thing if there had been a commission of bankrupt sued out, and the property had been divested. This is a very common arrangement, which it would be injurious to disturb, where there has been no commission." It is not a matter of surprise, that *Justice Sutherland* should regard the case of *The King vs. Watson and another*, as a very bald one, and entitled to very little weight as authority.

By this case, of *The King vs. Watson and another*, it is asserted by the counsel for the appellee, that the validity of such an assignment as that now before this court, has, in *England*, been conclusively established. If this assertion were well founded, it would certainly have its weight in the determination of the case before us. But, for this assertion, there is no sufficient foundation. In the assignment in the case of *The King vs. Watson and another*, there was wanting that provision which unequivocally impresses the stamp of fraud on the assignment in the case before us, viz., that the whole property of the debtor should be divided amongst such only of the creditors as should release their demands against him. In the case referred to, the property assigned was for the benefit of all the creditors, each of whom was required, to entitle him to his dividend, to give a release in full to his debtor. But the amount of dividend to be received by any creditor who acceded to the terms of the assignment, was identically the same, whether he alone, or all of the creditors, consented to conform to the conditions of the assignment. Upon no contingency could any creditor

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

receive more than his just proportion, upon an equal distribution of the property of the debtor amongst all his creditors. The dividends of those creditors, who rejected the terms proffered by the assignment, upon the principles of a resulting trust, became the property of the debtor, and as such could be pursued by the rejecting creditors. All that was there decided was, that the hindrance and delay to creditors, produced by the assignment, did not avoid it; and that it was not vitiated by the requisition, that the creditors participating in the benefits which it conferred, should release their claims. It left open to a dissenting creditor the means of recovering, from the effects of his debtor, the same *pro rata* amount which was received by the assenting creditor. It violated not, therefore, in that respect the rule of equity and justice, equality amongst creditors in the distribution of the estate of the debtor. But above all, it imposed no unjust moral compulsion on the creditor to surrender rights, with which he was unwilling to part. In that case the residue, in the hands of the trustees, was not, as here, to be divided between those who should release their claims, but between all the creditors, each creditor receiving his dividend to release the debtor.

Believing the question now before us never to have been decided in *England*, how does it stand affected by *American* decisions, is our next inquiry? Three of the cases relied on by the appellee, relate to the construction of a statute of the State of *Pennsylvania*, (which, as regards the present question, differs not from the 13 of *Eliz.*, chap. 5,) and to transactions originating there, and subject to the *lex loci contractus*. And the first to which we are referred, is that of *Pierpoint and Lord, vs. Graham*, 4 Wash. C. C. R., 232. There the same question was presented for adjudication with that now before us. But the grounds upon which, in that case, the court's opinion is based, on the question as to the validity of the assignment, by reason of its benefits being exclusively confined to such creditors as should, within sixty days from its date, release their demands against the assigning debtors, are any thing but satisfactory. The learned judge, after stating that such a deed would be void, if no time, or an unreasonable time were

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

prescribed for the execution of the releases, thus proceeds: “but where a reasonable time is limited, within which the trust property is to vest in those, in whom the beneficial interest is intended, or will be relieved from the operation of the assignment, I can perceive no reason for imputing fraud to such a transaction. It is true, that during that period the property is, or may be protected from the claims of creditors: but is so protected for the benefit of those very creditors, and consequently, for an honest purpose. It cannot, in short, be said to be made with intention to defraud or delay creditors, when its professed object is, to put it in the power of the creditors to accept or to reject the benefit intended them; and in the latter case to leave the property subject to their rights, in like manner as it would have been, had the assignment not been made.”

Such a view of the question presented to the consideration of the court, is neither sound nor practical; and makes the solution of the question depend on the mere delay to the creditors: which deserved not to be regarded as an ingredient in the fraud, imputable to the assignment. It was not to be complained of, as fraudulent, because creditors were delayed or hindered for the space of sixty days, in the prosecution of their claims, but because, by an ingeniously devised proviso in the assignment, the debtor has practically placed all the property he owned in a situation, in which he, in truth, says to his creditors, unless you release to me, that to which in justice and according to the obligation of my contracts, and the laws of the land, you are entitled, such of you as refuse to do so, shall receive no part of the property that I owned, and which ought to have been applied to the payment of your debts. That such would be the intention of the debtor in executing such an assignment; that such must be its effect and operation, no man, who reflects upon the subject, or is at all acquainted with such transactions, can for one moment doubt. View it in any other light, and instead of the stringent coercion and fraudulent aspect which it has assumed, it will become a mere proffered deed of composition between the debtor and his creditors, and from the reasons which are assigned for his decision, in that light only was it regarded by the learned judge. He says, it cannot, in short,

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

be said to be made with intention to defraud or delay creditors, when its professed object is to put it in the power of the creditors to accept or to reject the benefit intended them; and in the latter case, to leave the property subject to their rights, in like manner as it would have been had the assignment not been made." Had such been the object, and natural result and operation of the assignment, the soundness of the judge's reasoning could not have been controverted. But the manifest design and effect of the assignment is wholly misconceived in such an interpretation of it. He appears to have looked at it as if it were the offer of a benefit to creditors, to be accepted by all or none of them. Nothing could be further from the true interpretation and clearly expressed intent of the assignment. The opinion of the judge, as manifestly appears by his reasoning, was given on the assignment, where all the creditors should have accepted or all should have rejected, its stipulated terms. In the first branch of this alternative, there could be no fraud perpetrated injuriously against the rights of any creditor, upon the principle of "*volenti non fit injuria*:" in effect the transaction would then become a composition between debtor and creditors, of the validity of which there cannot be a doubt. On the second branch of the alternative, all that was determined was, that it was no such hindrance or delay of creditors, as under the statute of 13 *Eliz.*, *chap.* 5, would render it fraudulent and void. Whether such an assignment as that before the court, in *Pierpoint and Lord, vs. Graham*, where part of the creditors accepted and part of them rejected the terms prescribed, was, in that case, fraudulent and void, was a question which the reasoning of the learned judge demonstrates, was not in his contemplation when delivering his opinion, and was not considered or determined by him. The case, therefore, cannot be regarded as an authority of any weight in the determination of the question now before us.

The next case is that of *Lippincott vs. Barker*, 2 *Binney*, 174, which presents the same question as that submitted for our decision; but the strong ingredient of fraud, the principle of coercion and exclusion, was never noticed by the counsel who argued the case. It is true, *Chief Justice Tilghman* does

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

briefly mention the exclusion of creditors as an objection to the deed, but he refers more strongly to the requirement of the release by the debtor; and after an examination of the facts in the case, (amongst which was the assent of all the creditors, but two or three, before the execution of the assignment,) he thus concludes his opinion. "I beg, however, to be distinctly understood, that my opinion is confined to the circumstances of the present case, for there are many and strong objections to deeds of assignment, made without the privity of creditors, and excluding all who do not execute releases." *Justice Yeates* delivers his opinion in the case, sustaining the deed without the expression of any such reservation as was made by the *Chief Justice*. But *Justice Breckenridge* gives his opinion, which is both able and eloquent, pronouncing the deed to be fraudulent and void. Looking to the dissenting opinion of *Breckenridge, J.*, and the qualification attached to his opinion by *C. J. Tilghman*, it may well be questioned, whether the validity of such a deed as that now before us, has, by the two cases referred to, been definitively settled in the State of *Pennsylvania*.

The third case is that of *Brashaer vs. West and others*, 7 *Peters*, 608; and is said, by the counsel of the appellee, to be decisive of the present question. But the decision in that case is productive of no such result, nor are its facts such as they are regarded by the counsel for the appellee. The case was decided, not upon the ground that either upon reason or principle the decision below could be sustained, but that the assignment being made in *Philadelphia*, and its validity depending on a statute of *Pennsylvania*, the construction of which, the Supreme Court supposed, had been settled in that State, by the case of *Lippincott and Annesly vs. Barker*, 2 *Binney*, 174, and therefore said, "but whatever may be the intrinsic weight of this objection, it seems not to have prevailed in *Pennsylvania*. The construction which the courts of that State have put upon a *Pennsylvania* statute of frauds, must be received in the courts of the *United States*." And immediately preceding this extracted passage from the opinion of the Supreme Court, *Chief Justice Marshall*, by whom it was delivered, says:

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

“yet we are far from being satisfied that, upon general principles, such a deed ought to be sustained.” In *Maryland*, then, where, (as was said by both parties litigant here,) the question on the 13 of *Eliz.*, now before us, has, for the first time, so arisen, as to render its decision indispensable, and which must, therefore, be decided as well upon general principles as authority: the case of *Brashear vs. West and another*, is rather to be regarded as of weight against the doctrines contended for by the appellees, than in their favor. And the same remarks applies with equal force, and for a like reason to the case of *Halsey et al., vs. Whitney et al.*, in 4 *Mason*, 206, hereafter to be remarked on. But suppose the case of *Brashear vs. West and others*, not to have been decided, as in fact it was, upon the local law of *Pennsylvania*, but upon general principles, it would not then, as was asserted, be a decision upon the very question now before this court, because the facts are essentially variant in the two cases. In that before us it is conceded, that the assignment being made for the benefit of such creditors as should release their claims, the appellant, the recusant creditor, can receive nothing from the property assigned. In the case of *Brashear vs. West and others*, the releasing creditors were not entitled to the whole property assigned, but to such dividends only as they would have been entitled to had all the creditors consented to come in, and had complied with the terms of the conveyance. The dividends to which the dissentient creditors, if assenting, would have been entitled upon the principle of resulting trusts, became the property of the debtor, out of which, in the race of diligence with other dissenting creditors, if any, any one of them might have recovered the full amount of his claim, or as much thereof as he would have been entitled to, had the assignment been made for the general benefit of all the creditors, without the requirement of any releases. That an assignment, without such requisition, for the general benefit of all creditors, would be good, it cannot be necessary to cite authorities.

To prove that the same principle prevails in *Massachusetts* that, it is alleged, has been established in *Pennsylvania*, the case of *Halsey et al., vs. Whitney et al.*, 4 *Mason*, 206, de-

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

cided by *Justice Story*, is relied on as of paramount authority: the question there being identical with that now under consideration. The learned justice, after a very extended examination of various adjudications, in none of which was the precise point adjudicated, which he was then called on to determine, proceeded to state the grounds on which his judgment was about to be pronounced, as follows: “The decisions in *Massachusetts*, therefore, leave the question *in equilibrio*. But when we take into consideration the great length of time during which stipulations of this nature have prevailed in this State, without objection, there is much reason to believe, that the profession have deemed the law settled in favor of the debtor on this point. Then, on the other hand, in *Lippincott vs. Barker*, 2 *Binney*, 174, where the direct point arose, it was settled, that a stipulation for a release was not fraudulent. The reasoning of the court is limited, indeed, to the circumstances of the particular case, but it would be difficult not to perceive, that it naturally reaches further. I find also that my brother, *Mr. Justice Washington*, in *Pierpoint vs. Lord*, in 1820, is reported to have held, that an assignment, in trust for the benefit of such creditors as should release their debts, is founded upon a sufficient consideration in law. The case is not in point, but it was probably decided on the general principle. There is, however, a case in *England* directly in point. It is *The King in aid of Braddock, vs. Watson*, 3 *Price*, 6, where the very exception was taken by counsel, and the assignment was held to be good by the *Court of Exchequer*, against the claim of the crown itself. The weight of authority is then in favor of the stipulation, for the decision in *New York* did not turn upon the naked point of a release, but upon that as incorporated into a peculiar trust. I am free to say, that if the question were entirely new, and many estates had not passed on the faith of such assignments, the strong inclination of my mind would be against the validity of them. As it is, I yield without reluctance, to what seems the tone of authority in favor of them. If the result had been different, this assignment would have been void in toto, for it could not, where the fraud was apparent on the face of the deed, be good in favor of any of the credi-

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

tors who had signed it. They must, under the circumstances, be deemed cognizant of, and participators in, the unlawful object.”

In commenting on the case of *King vs. Watson*, 1 *Exchequer Rep.*, 265, which is the same case referred to by *Justice Story*, as *Braddock vs. Watson*, 3 *Price*, 6, it was attempted to be shewn, and it is believed not unsuccessfully, that the same question now before us, did not, and could not arise in that case. From it, therefore, his decision can derive but little support; and by the other authorities it is but feebly sustained. The learned justice, after stating, that if the question were a new one, his own opinion would be against the validity of the deed, and that the decisions in *Massachusetts* were *in equilibrio* upon the subject, seeming to feel that the opinion he was pronouncing, stood in need of all the aid he could invoke, to its support, states: “but when we take into consideration the great length of time, during which stipulations of this nature have prevailed in this State, without objection, there is much reason to believe, that the profession have deemed the law settled in favor of the debtor on this point.” Had *Justice Story* reflected upon the nature and object of the assignment before him; the designs of its inventor, and its potency for their accomplishment; he would have been able to have given a much more satisfactory reason than he did, for “the great length of time, during which stipulations of this nature have prevailed” in *Massachusetts*. By the execution of such assignments, debtors but surrendered what their creditors could, without their consent, have taken from them; and that too, without condition or stipulation. The stipulations in the assignment were, if assented to, of great value and importance to the debtors. If dissented from, their condition was no worse than before the assignments were executed. Both they and their creditors well knew, or must be assumed to have known, that neither the validity or invalidity of such assignments was a matter of legal certainty: that to say the least of it, there was a doubt upon the subject. And of this the natural consequence was, the prevailing, continuing execution of such instruments. By them the debtors had every thing to

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

gain and nothing to lose. And the fears of creditors, on which it was the object and intention of such conveyances to operate, were sufficiently powerful in most cases to induce the acceptance of the proffered stipulations. As a matter of course then, the prevalence of such assignments would continue, until their invalidity was judicially determined. On this theory, the long continued practice of making such assignments, is much more truly and rationally accounted for, than by the assumption of *Justice Story*, "that the profession have deemed the law settled in favor of the debtor on this point." On what grounds he drew the inference, that no objection had been made to such stipulations, prevailing for so great a length of time, we have not the means of ascertaining. But it is somewhat difficult to understand, how the judicial decisions of the State should have left "the question *in equilibrio*," if there never had been, with the profession, an objection or doubt as to the validity of such stipulations. If, as was asserted, there never had been an objection by the profession to such stipulations, how could there have been decisions upon the subject, which should "leave the question *in equilibrio*?" Referring to the law reporters of that State, we find them long before, and about the time of the decision in 4 *Mason*, and long afterwards, filled with cases, in which objections to the validity of such stipulations, were the matters in controversy, and for decision by the court. And that in many, nay, most of the cases, the stipulations were far less objectionable, than those in the assignment before *Justice Story*; and that now before this court. And that many of those cases were conducted by members of "the profession," who stood amongst the foremost at the bar of that State. Viewing the case in 4 *Mason*, therefore, as it must here be regarded, it cannot be entitled to much additional weight, from its alleged conformity to the settled opinion of "the profession" in *Massachusetts*.

But it is alleged, that whatever doubts may have once existed in *Massachusetts*, the question is now definitively settled, in favor of the validity of such a deed as that now before us. And as authority for this, the case of *Nostrand vs. Atwood*, 19 *Pick.*, 281, has been cited. The allegation as to this case, is

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

unsustained by its examination. It was determined upon a distinct and independent ground, and leaves the question, now before us, wholly undecided; as is manifest from the following extract from the court's opinion: "In the view we have taken of the present case, it is wholly unnecessary to consider those various adjudications, or to pronounce any opinion upon the abstract question, of the effect of the introduction into an assignment of a stipulation for a release by the creditors, who became parties to it, in a case where such a stipulation might be prejudicial to a creditor, indisposed to assent thereto, and who might thus be deprived of receiving his share of the fruits of the assignments."

It has been stated, on the part of the appellees, that the validity of such an assignment, as that now before this court, was established in the State of *Maine*, by the case of *Fox vs. Adams et al*, 5 *Greenleaf's Rep.*, 345. But in that case the question was not decided: the deed having been adjudged to be invalid on other grounds.

It is believed that the only State in the Union, in which the validity of such a deed as that now before us, can be regarded as having been adjudicated, is the State of *Pennsylvania*. Whilst the invalidity of such conveyances has been conclusively settled in *Maine*, *Connecticut*, *New York*, *Ohio*, and *Missouri*: and that too, after a most thorough and learned examination and consideration of the subject. For which, see *Lord vs. The Brig Watchman*, 8 *American Jurist*, 284. *Ingraham vs. Wheeler*, 6 *Conn.*, 277. *Armstrong vs. Byrne and others*, 1 *Edward's C. R.*, 79. *Mills and others, vs. Levy and others*, 2 *Edward's C. R.*, 183. *Grover vs. Wakeman*, 11 *Wendell*, 187. *Atkinson and Rollins vs. Jordan and others*, 5 *Ohio Rep.* 293. And *Brown vs. Knox*, 6 *Missouri Rep.* 302. That the uncontrolled opinions of *Chief Justice Marshall*, and *Justice Story*, were in accordance with these decisions, is clearly shewn by the cases hereinbefore referred to in 7 *Peters*, and 4 *Mason*.

The sound and sensible doctrine upon this subject, as applicable to the case before us, was settled by the case in 11 *Wendell*, where it was held, "that a debtor, in failing circumstan-

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

ces, might, by assignment of his property in trust, prefer one creditor, or set of creditors, to another, provided he devote the whole of his property assigned to the payment of his just debts, and the assignment be absolute and unconditional, without any reservation or condition for his benefit; without extorting from the fears and apprehensions of his creditors, or any of them, an absolute discharge as a consideration for a partial dividend, or making the preferences, or any of them, to depend on the execution of a release by such preferred creditors to him, of all claims against him. An assignment, giving preferences upon such a condition, is void; and the assignment being void in part, as against creditors, and the provision of the statute, is void in toto, though there be no fraud in fact, intended.”

It may not be amiss to notice, that if by judicial decisions in *Massachusetts* and *Pennsylvania*, such assignments, as that now before us, may, as has been contended, formerly have been sanctioned; the legislatures of those States have, by positive enactment, removed all doubt as to the invalidity of such instruments, subsequently executed. See *Massachusetts Statutes of 1836, chap. 238*; and *Laws of Pennsylvania of 1843, No. 131, page 273*.

Will the judiciary of *Maryland*, now, for the first time, acting upon the subject, and not constrained to do wrong against its conviction of right, at this time of day, give countenance to conveyances which every State in the union, where they have been definitively acted upon, have, legislatively or judicially, exploded as unjust or fraudulent against creditors? It should not be so.

Whilst insolvents, whose conduct merits kindness and protection, will ever be treated accordingly by courts of justice, in doing so it should not be forgotten, that creditors have rights, which it is an equal duty to protect. And whilst those tribunals should legitimately exert all the powers they possess, to protect debtors from the oppression and persecution of creditors, they should vigilantly guard against that over-weening, dangerous sympathy, which would lead them to sanction unjust and fraudulent designs of debtors towards their creditors.

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

Dissenting from the county court's refusal to grant the appellants prayer; and from its opinion, as expressed to the jury; I think its judgment should be reversed, and a procedendo awarded.

MARTIN, J., concurred with DORSEY, J.

MAGRUDER, J., delivered the following opinion :

This appeal is taken from a judgment of *Baltimore* county court. The record contains but one exception, and that exception presents but this one question. Did the plaintiff show a right to impeach the validity of the deed on which the defendants relied, as evidence of their title to the property in controversy? The court below said that he did not, and the verdict in consequence being for the defendants, we are now to decide whether the plaintiff can complain of that decision?

The case was this: On the 24th September 1840, *George Carey and others* executed a deed of trust to the appellees, thereby transferring to them property of which the possession was delivered, for the declared purpose of paying their creditors. By the provisions of the deed, some of the creditors are to have a preference, all others are to be paid so far as the trust funds will enable the trustees to pay them, provided within ninety days from the date of the deed, such creditors shall execute and deliver to their debtors a full and final release, and discharge from their claims. Nothing is reserved to the debtors, unless there be a surplus after discharging all claims against them. The grantors, who had been engaged in trade, had, some months previously to the execution of this deed, stopped payment, and not long after its execution took the benefit of the insolvent laws, and obtained a final discharge.

The appellants, acknowledged creditors of the firm, refused to accede to the terms of the deed, to which many of the creditors had agreed, and on the 22nd March 1841, sued out of *Baltimore* county court an attachment, upon a judgment which they had obtained against the insolvent firm. This attachment was laid in the hands of the appellees, (the trustees in the deed,) the appellants insisting, that the deed of trust was, as against them, void, and that their attachment, and the service

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

of it, as stated, gave to them a right to be paid the amount of their judgment, out of the effects which the deed had placed in the hands of the garnishees. This claim, of course, was inadmissible, if the deed was valid, and thus the question arises.

It cannot be denied, that a debtor may give a preference to a creditor or class of creditors. "A debtor has a right to prefer one creditor to another, and his private motives for giving the preference cannot affect the exercise of the right, if the preferred creditor has done nothing improper to procure it." 7 *Wheaton*, 556. "An insolvent debtor has a right to prefer one creditor to another, in payment, by an assignment made *bona fide*, and no subsequent attachment, or subsequently acquired lien, will avoid such assignment." 8 *Wheat.*, 268. "An assignment by a defendant, pending the plaintiff's suit, of all his effects for the benefit of his creditors, under which possession was immediately taken, is not fraudulent, although made to delay the plaintiff's execution, neither is it fraudulent to confess a judgment to one creditor, in order to defeat the pending execution of another creditor, for a debtor, as well as an executor, may give preference to a particular creditor." 2nd *Starkie*, 622, 1st *Am. edit.* "As a debtor may prefer one creditor to another, so he may, on the eve of an execution by one creditor, assign his property to another, so as to satisfy the latter and leave the other unpaid." 5 *T. R.*, 235. "An assignment by a creditor of all his funds, for the use of such creditors as shall, within a prescribed period, execute a release of all their demands, is valid, if reasonable time is given to enable the creditors to have notice, and to decide whether they will accede to the terms." 4 *Wash. C. C. Reports*, 232.

If, in the books which have been cited, the law is correctly laid down, it would be difficult to maintain, that the deed under consideration is void. To be sure, in *England*, such a deed, if executed by a trader, would be considered fraudulent, and would be an act of bankruptcy. But this is not because, all debtors are under a real obligation to pay all creditors an equal proportion of their debts, but simply because it is in contravention to the policy of the bankrupt system. For the same

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

reason, if a debtor convey all his property to trustees, though for the benefit of all his creditors, it is an act of bankruptcy. There are some acts, remarks *Smith*, in his treatise on mercantile law, which, if done by *private persons*, are valid, but if done by a trader, are fraudulent. Here we have no bankrupt law, and all acts of this description, done by our citizens, are treated as the acts of “private persons,” and are valid, if, when done in *England* by persons who are not traders, they would not be pronounced to be fraudulent and void, as against creditors.

The deed, it is true, must not be so framed as to keep the property in the power of the debtor. Such a case is to be found in 14 *Johnson*, 458. But in that case the deed was declared to be void, not because of the clause which required a release to be executed by the creditors, but by reason of a clause, that in case any of those creditors should refuse to give a discharge, then, “in further trust, after paying the debt due to the trustee, to pay such of the creditors of the assignors *as they*,” (the debtors,) “*should appoint*.” This clause, it was determined, kept the property in the hands of the debtors, and would enable them *to compel* the creditors to acquiesce in the terms offered to them. The deed was therefore declared to be void *in part*; and being void in part, the whole must be void. But with respect to the case before us, it may be said, in the words of *Jeremy*, p. 418, “the creditors are not under any obligation to accede to the terms proposed, and this court will not interfere to prevent any who have not accepted the same, from adopting measures to compel satisfaction of their demands, or to direct the execution of the purposes of the deed, where all of them have not concurred.” In *Brashears vs. West and others*, 7 *Peters*, 614, *Chief Justice Marshall* said, “the preference given in this deed to favored creditors, though liable to abuse, and perhaps to serious objections, is the exercise of a power resulting from the ownership of property, which the law has not yet restrained.”

Deeds of trust for the benefit of creditors may be fraudulent. They must not be executed *mala fide*. In 1st *Story's Equity*, 370, &c., we are told what will render them void. But any

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

thing like an intent to defraud the plaintiff in this case, cannot be pretended. It can scarcely be said that such arrangements are necessarily void, while it is admitted, as in *Grogan vs. Cooke*, 2 *Ball and Beatty*, 230, that it is “neither illegal nor immoral” for the debtor to prefer one creditor to another. What then is the amount of the doctrine contended for on the part of the plaintiff? The deed which had been executed became void, because these plaintiffs, for whose benefit, among others, it had been executed, refused to accede to the terms of it. But the debtor may cancel that deed, and afterwards execute another, conveying the same property to those creditors, (naming them,) who have acceded to the terms, and this deed will place all his property out of the reach of the plaintiffs.

It must indeed be admitted, that in some of our sister States there seem to have been decisions that deeds, like the one before us, are void. These decisions, however, it is believed, have proceeded from a disposition in their courts, to make what has already been stated to be the policy of the bankrupt system, a part of the general law. Other courts, certainly entitled to as much respect here, have adjudged them to be valid. See 4th *Washington C. C. R.*, 232. 4 *Mason*, 206. 2 *Binney*, 174. See also 2nd *Story on Equity*, (the latest edition,) sec. 371. 4 *Dallas*, 224.

In *Maryland*, it is believed, there has been no decision by our highest judicial tribunals; but the general impression, it is thought, always has been, that a deed of this description, executed, *bona fide* by a debtor, for the benefit of such creditors as will release their claims, cannot be declared void at the instance of a creditor, who refused to sign such release; and that such deeds have not been condemned by that class of the community, who must be allowed to be the best judges upon the subject. In 4 *H. & J.*, 475, (*Pannel vs. McMechen*,) we have a deed, like this in its provisions, executed as long ago as in the year 1813, and to which every objection might have been urged, which has been urged to the deed under consideration. It is true, the point was not, and perhaps could not well be raised, in that case: but those who have a knowledge of those times, know, that there were creditors who would have

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

denied the validity of that deed, but for the, then, belief, that for any of the reasons now assigned, deeds of that description could not be assailed.

It is true it cannot be said, that in this State the question is *res adjudicata*; and of course it must be admitted, that the question, as yet, has not been finally and conclusively settled in this State. But is this a reason why these general, and long existing impressions of the law should not have great influence in the decision of the question? Our predecessors seem to have thought differently. In the case of the *State vs. Chase*, 6 *H. & J.*, 297, it was argued that the action could not be sustained, because, as it was supposed, the act of 1786, chap. 53, did not authorise a suit against the State, upon a claim of that description. The question had never before been made, and, of course, no decision in favor of the plaintiff could be cited. But the court said there was nothing in that objection: "The act of 1786, has so long and so often been practised upon," (some four or five suits grounded upon it had been brought,) "that it is not now thought to be *open to construction*." In the case of *Kiersted and others, vs. the State*, the question arose, whether upon a bond given to the State by an insolvent, a suit could be brought for the use of creditors, there being "no authority so to take them." After stating, that upon enquiry the court had ascertained, that for more than twenty years they had been passed to the State, whether taken by the courts, the judges, or the commissioners of insolvent debtors, and remarking, that it is not easy to say what may have produced this unanimity, the learned judge proceeded: "Whatever may have led to the practice, its consistency fully establishes the cotemporaneous construction of the first act in this system of laws, and we think *it has too long obtained to be at this time shaken and disturbed*. See 1 *G. & J.*, 247. A reference might also be given to *Shafer vs. Stonebraker*, 4 *G. & J.*, 345. So in the case of *McKee vs. Delaney's lessee*, 5 *Cranch* 22, it was determined, that although the law of *Pennsylvania* required deeds to be acknowledged before *justices of the peace of the county where the lands lie*; and a practice which prevailed, of acknowledging them before a jus-

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

tice of the *Supreme Court*, was clearly, as the court supposed, unauthorised by the law, yet, as the impression and the usage in consequence of it had prevailed for many years, that usage, and not their interpretation of the words, was adopted by the court, as a correct construction of the act. How far the judges of *England* will be governed by a prevalent usage, in commercial transactions, and others too, may be seen by a reference to “*Ram on Legal Judgments*,” p. 67, &c.

These remarks have been made because of, and perhaps we can only find for them an excuse, in the strange and unhappy disposition which sometimes is met with, to quarrel with received opinions in regard to the law, and perhaps for no better reason, than that they have been for a long time the received opinion. It often happens that a question is not *res adjudicata*, because the community which is interested in it, had but one opinion about it, and yet, (such is the weakness of man, and how much to be deplored, if discovered in courts,) a belief is often entertained, that to question doctrines well known, though not *authoritatively* settled, denotes superior wisdom; and that the man who can imagine *that* to be law, which never was deemed to be so, must necessarily be wiser than all who lived before him. Another evil of the day, (and it is an evil which it ought to be the business of courts to check, and correct, as far as it is possible,) is this, a jurist, or *qua* jurist, gets possession of a volume of the *Reports* of some other of the States, and there finds an express adjudication, expressly at war with the prevailing impressions in regard to the law of *Maryland*,—without reflecting, that although the law of another State be, as it there is adjudged to be, yet this is no proof that the law is so in *Maryland*,—he concludes, that the law as understood by those around him, cannot be our law, because the law is *adjudged* to be otherwise, elsewhere. Now this is unquestionably to assume, that the law of this State is better understood every where out of this State, than by even the learned men of the State. There are persons, moreover, in our community, who would be gainers by the discovery, if our own courts should chance to approve of the *extraterritorial* decision, and without caring to enquire, how much of evil a decision

McCall, *et al.*, vs. Hinkley and Woodward.—1846.

contrary to the usage and custom among us, may produce, commence a litigation which is to decide a question, never before decided, because it never had been, and but for the decision in a different State, never would have been, questioned in *Maryland*. While it will not be maintained that the law, as understood by every body, ought not in any part of it, or under any circumstances, to be decided to be otherwise than it is so generally supposed to be, yet in a case of this description, I am prepared to say, that believing this deed to be valid, according to the consistent, and perhaps unvarying, impression among us, for very many years, it ought to remain unchanged: except, in the words of this court on a former occasion, “upon the most imperious and conclusive grounds.” And I hesitate not to adopt unqualifiedly the reasoning of *Justice Story*, in deciding this question for *Massachusetts*, in the case, 4 *Mason* 206. I will add, that in deciding this question, of such importance to the commercial community, I am not disposed to undervalue the opinion of the eminent judge, who signed the exception before us, and this upon a question like the one under consideration.

In closing these remarks, which owe their existence to an equal division of the Court of Appeals, upon a question of importance to the business part of the community, I shall adopt, as more appropriate language in which to express my opinion, than any which I can command, the words of the distinguished judge in *Pearpoint and Lord vs. Graham*, *Wash. C. C. Rep.* 236: “If,” (said *Judge Washington*,) “the condition of executing releases is, *per se*, an evidence of fraud, then the deed was void as soon as it was made; and the subsequent acquiescence and compliance with the terms of the assignment by a part of the creditors, could not give it validity. * * * * Where a reasonable time is limited, within which the trust property is to vest in those for whom the beneficial interest is intended, or will be relieved from the operation of the assignment, I can perceive no reason for imputing fraud to such a transaction. It is true, that during that period the property is, or may be, protected from the claims of creditors: but it is so protected for the benefit of those very creditors, and consequently for an

Thompson vs. State, use of adm'r of Ford.—1846.

honest purpose. It cannot, in short, be said to be made with intention to defraud, or to delay creditors, when its professed object is to put it in the power of creditors to accept or reject, the benefit intended them: and in the latter case, to leave the property subject to their rights, in like manner as it would have been, had the assignment not been made.”

CHAMBERS, J., concurred with MAGRUDER, J.

JUDGMENT AFFIRMED.

CHARLES THOMPSON vs. THE STATE, USE OF BENJAMIN G. HARRIS, ADM’R OF LEWIS J. FORD.—*December 1846.*

By the terms of the 22nd sec. of the act of 1820, chap. 191, the bond given for the purchase money of land sold under that act, is required to be with condition, to pay the money over to the representatives of the deceased, “in such proportions as each may be entitled to, agreeably to the order of the court” by which the sale was adjudged. Until the court has passed an order ascertaining the proportion to which a representative is entitled, he cannot maintain an action on such bond.

The case of *Ridgely vs. Iglehart*, 6 *Gill & Johns.*, 49, as to the construction of the act of 1820, chap. 191, sec. 22, explained.

Where the issue upon general demurrer definitively settles the law of the case against the plaintiff, the issues in fact are not to be tried.

APPEAL from *St. Mary’s* county court.

This was an action of *debt*, commenced on the 3rd August 1843, by the appellee against the appellant.

The plaintiff declared on the bond of *Joseph Ford*, the appellant, and *Francis Herbert*, dated the 6th March 1838, containing the following recital and condition :

“Whereas the commissioners appointed, by an order of *Saint Mary’s* county court, to sell the real estate of *Lewis Ford*, late, &c., did, on the 13th February 1838, after due notice being given, sell the real estate of the said deceased, and at which said sale the aforesaid *Joseph Ford* became the highest bidder and purchaser of a tract or parcel of land, being part of “*Gilmott’s Hills*,” (otherwise known as “*Prospect Hill*,”) containing, &c., for the sum of \$3000; and also at the said sale, so as aforesaid made, the said *Joseph Ford* became the highest bidder and purchaser of another tract or parcel of land, called

Thompson vs. State, use of adm'r of Ford.—1846.

“*Part of Gilmott’s Hills*,” containing, &c., for the sum of \$2450. Now the condition of the above obligation is such, that if the above bound *Joseph Ford*, *Charles Thompson*, and *Francis Herbert*, or either of them, their heirs, executors or administrators, do, and shall well and truly pay, or cause to be paid, unto the legal representatives of the said *Lewis Ford*, deceased, their, and each of their respective shares or portions, of the sum of \$5450, being the amount of the purchase money aforesaid, with legal interest thereon, in three equal annual payments, from the day of sale aforesaid, agreeably to the order of *Saint Mary’s* county court, then this obligation to be void, otherwise,” &c.

After oyer of the bond and its condition, craved and granted, the defendant pleaded general performance of the condition.

The plaintiff, after setting forth all the facts alleged in the recitals of the bond, and ratification of the sale, replied, “that the sum of \$5241.16 remained, after deducting the costs and expenses of proceedings under said petition, of the proceeds of the sale of said land; and that the sum of \$1310.29, part of said proceeds, with interest thereon from day of sale, was due and payable to the said *Lewis J. Ford*, one of the heirs of the said *Lewis Ford*, dec’d, whereby the said *L. J. Ford* then and there became entitled to have and receive the said sum of \$1310.29, and interest thereon from said day of sale, and the said defendants, according to the condition of the said writing obligatory, became liable to pay to the said *Lewis J. Ford* the said sum of money, and interest thereon due,” &c.

The defendant rejoined :—

1st. That at no time prior to the institution of this suit, was any order passed by *St. Mary’s* county court, directing the payment of any portion of the purchase money mentioned in said bond, to the said *Lewis J. Ford*, as one of the legal representatives of *Lewis Ford*, or to the legal representatives of said *Lewis Ford*, according to the condition thereof, and this he is ready to verify, &c.

2nd. That the obligors did pay unto the said State of *Maryland*, the said sum of money in the writing obligatory aforesaid, mentioned, with interest thereon, and this he is ready to verify, &c.

Thompson vs. State, use of adm'r of Ford.—1846.

To the first rejoinder, the plaintiff, (the appellee,) demurred generally, in which the defendant joined.

To the second rejoinder, the plaintiff surrejoined non-payment and issue.

The county court rendered judgment on the demurrer for the plaintiff; and upon the issue of payment, the jury found a verdict of \$785.70 for the plaintiff.

The defendant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY and MARTIN, J.

By CAUSIN for the appellant, and

By J. JOHNSON for the appellee.

DORSEY, J., delivered the opinion of this court.

The county court, we think, erred in over-ruling the appellant's demurrer to the appellee's first rejoinder to the replication filed by the plaintiff below. By the express terms of the 22nd section of the act of 1820, ch. 191, the bond before us is required to be, and, in effect, is conditioned for the payment over of the purchase money, for which the land sold to the representatives of the deceased, "in such proportions as each may be entitled to, agreeably to the order of the court." Until, then, the court has passed an order ascertaining the proportion to which a representative is entitled, non-payment, as to him, is no such breach of the condition of the bond as would enable him to maintain an action upon it. The first rejoinder of the appellant denies the passage of any such order by the court before the institution of this suit, and the demurrer admits the truth of such denial. It hence follows, that the rejoinder demurred to, was a bar to the action; and that the demurrer ought to have been ruled good, and judgment of *non suit* entered against the appellee. It is true that this court, in the case of *Ridgely vs. Iglehart*, 6 *Gill & Johns.*, 49, did intimate a doubt whether the words in the 22nd sec. of the act of 1820, chap. 191, "agreeably to the order of the court," were intended to relate to the proportions to which each of the heirs might be entitled. But after mature reflection, and a thorough consid-

Chapman, adm'r, vs. Davis, exc'x.—1846.

ration of the subject, we are satisfied, that the words in the act of Assembly and bond, "agreeably to the order of the court," do apply to an order of the court in relation to the proportions of the representatives of the intestate, and not to the mere order of the court, directing the bond to be given to the State. The court, however, in *Ridgely and Iglehart*, (which was a proceeding in chancery,) conceived, no matter what construction, in this respect, should be given to the terms referred to in the bond and act of Assembly, that a court of equity could, for the reasons assigned, grant the relief sought by the bill, and enforce the lien of the purchase money upon the lands sold, and render full and adequate justice to the parties concerned. According to the strict and technical rules of the common law, we are of opinion, that no recovery can be had in the action on the bond before us, without the preliminary order as to the proportions of the representatives of the intestate.

The correct determination of the issue in law definitively settling against him the right of the appellee to the prosecution of his suit, there remained no ground for the trial of any issue in fact.

The judgment of the county court is reversed. No *procedo* will be awarded.

JUDGMENT REVERSED.

JOHN G. CHAPMAN, ADMINISTRATOR OF SAMUEL CHAPMAN,
vs. ELIZABETH G. DAVIS, EXECUTRIX OF THOMAS A.
DAVIS.—*December* 1846.

A defendant who appears in a cause, and after a general imparlance pleads the general issue to the plaintiff's declaration, cannot, because of a leave granted to the plaintiff to amend, plead in abatement a variance between the writ and the second nar.

The court will not receive a plea in abatement, grounded on such a variance, to an amended declaration filed after a general imparlance.

When a party has, by the character of his pleadings, waived all objections to the capacity of the plaintiff, or any other abateable matter then existing, he cannot be allowed to resume the objection.

A defendant cannot plead in abatement, a variance between the writ and count, without demanding *oyer* of the writ.

Chapman, adm'r, vs. Davis, exc'x.—1846.

The writ, without oyer, is no part of the pleadings, or even the proceedings in the cause.

Where a plaintiff sues out a writ as administrator, and declares as executor, it is a variance which a defendant may plead in abatement, if he presents the objection in due time, and in a proper mode.

In cases where the plaintiff can only maintain an action in his individual capacity, the addition of the word, administrator, may be treated as superfluous.

But where the plaintiff can maintain his action either in his personal or representative character, he is bound by his election.

Where affidavits filed in a cause, show that a plea in abatement was tendered by a defendant, immediately upon the declaration being amended, and the rule to plead laid, and to which plea a *ne recipiatur* was directed by the court, it was the duty of the clerk to have entered these proceedings upon the record, and having omitted to do so, the county court below, after appeal, upon transmission of the record to them, under a writ of diminution, may order the record to be corrected, and certified anew to this court.

Where the plaintiff sued out a writ as administratrix, and declared as executrix in assumpsit, under the general issue plea she may offer in evidence her letters testamentary, to show the character in which she sues.

Where *C* and *D* entered into a single bill, of which each paid one half, in an action by the executrix of *D* against the administratrix of *G*, on the ground that *C* was the principal debtor, and *D* only the surety, and for the purpose of recovering the whole debt from *C*'s estate, it is competent for *C* to prove, that he and *D* were members of the vestry of a church, on account of which the single bill was originally signed, to borrow money, and continued members thereof for a series of years; and that the fact of membership, and its continuance, as between *C* and *D*, might be proved by the acts and conduct of the parties, of which, parol proof was competent evidence.

An instrument of writing, reciting: "The vestry met agreeably to notice. Present *C*" and others, (not mentioning *D* as present,) "who resolved, that in order to finish the church, the vestry, or those of them who will consent to the plan, will agree to complete said church on their own responsibility," &c.—And to which was appended the following agreement: "We whose names are hereunto subscribed, do agree to exonerate *H* and *M* from any responsibility arising under the foregoing resolutions,"—signed by *C*, and *D*, and others,—is not evidence, *per se*, that *D*, who so signed, was a member of the vestry of said church at the time of the date thereof.

APPEAL from *Charles* county court.

This was an action of *assumpsit*, brought on the 12th March 1839, by the appellee, as administratrix of all and singular, the goods, &c., which were of *Thomas A. Davis*, late, &c., against the appellant. The writ was returnable to the 3rd Monday of March 1839, and returned *cepi*. At that term the

Chapman, adm'r, vs. Davis, exc'x.—1846.

defendant appeared, and laid the usual rule on the plaintiff to declare. Upon the prayer of the plaintiff to imparle, the cause was continued until August term 1839, when the plaintiff declared upon the common counts, &c., *describing herself in the declaration as executrix*.

The defendant pleaded *non assumpsit*, on which the issue was joined.

The cause was then regularly continued from term to term, until August term 1841, when the plaintiff prayed leave to amend her declaration, which was granted, and the cause again continued. At March term 1842, the leave to amend was withdrawn.

The defendant then pleaded as follows :

“And the said *John G. Chapman*, administrator as aforesaid, defends the wrong and injury, when, &c., and prays judgment of the writ aforesaid, because he saith, that there is a variance between the writ aforesaid, and the declaration of the said plaintiff against the said defendant, founded on the writ aforesaid, in this, to wit, that in and by the said writ, the said plaintiff is called by the name of *Elizabeth G. Davis*, administratrix of all and singular, the goods and chattels, rights and credits, which were of *Thomas A. Davis*, late of *Charles* county, deceased, and in the declaration aforesaid, founded on the said writ, by the name and addition of *Elizabeth G. Davis*, executrix of the last will and testament of *Thomas A. Davis*, late of *Charles* county, deceased. Wherefore, inasmuch as there is such variance between the writ aforesaid, and the declaration of the said plaintiff thereon, founded in the name and addition of the said plaintiff, and because there is manifest variance between the original writ aforesaid, and the declaration of the said plaintiff thereon founded, he, the said defendant, prays judgment of the said writ and declaration, and that the same be quashed,” &c.

The plaintiff then prayed, that the said plea be not received, but that the same be stricken out; which prayer was granted, upon the ground that the defendant having failed to plead said plea in abatement heretofore in proper time, and having pleaded the general issue plea, it was now too late for said plea in

Chapman, adm'r, vs. Davis, exc'x.—1846.

abatement to be filed, and that the filing of said plea had been waived in legal contemplation, by the filing of said general issue plea. The defendant excepted.

At the trial of the cause, and immediately after the court had given the opinion expressed in the first bill of exceptions, which is made a part of this bill of exceptions, the defendant tendered to the court a general demurrer to the plaintiff's declaration, but the court refused to permit said general demurrer to be filed, until the defendant had first obtained leave to withdraw the plea of the general issue, filed at the August term 1839, of this court, the defendant, by his counsel, contending that there was no necessity for said leave, as the leave to amend the declaration, granted to the plaintiff at August term 1841, had the effect to withdraw said plea, and the issue thereon joined from the proceedings in the cause. To this opinion of the court, and their refusal to accept the general demurrer, so as aforesaid tendered by the defendant's counsel, the defendant again excepted.

From these decisions, which constitute the 1st and 2nd exceptions, the defendants appealed, and then withdrew his plea of *non assumpsit*, and demurred generally to the plaintiff's declaration; the county court sustained the demurrer.

The plaintiff then moved for leave to amend her declaration, which was granted. She declared anew for money paid and laid out by her, as executrix, for the defendant, as administrator, at his special instance and request, and made profert of her letters testamentary.

At this stage of the cause, the defendant again tendered his plea of abatement, grounded upon the variance aforesaid, which the county court again refused to receive. The issue was then joined on the plea of *non assumpsit*.

The defendant also pleaded limitations to the amended narrative. The plaintiff demurred generally, and the court sustained that plea also, on which issue was then joined.

The jury found a verdict for the plaintiff.

When the record was first filed in this court, the *second* tender of the plea in abatement did not appear, neither did the refusal of the court to receive it. It had not been entered on

Chapman, adm'r, vs. Davis, exc'x.—1846.

the docket of the court. Upon diminution suggested by the defendant, the record was transmitted for correction, and upon motion, and proof to that court of the omission of the clerk, an amendment was ordered correspondent with the facts. The record returned here under the diminution, showed the correction.

3RD EXCEPTION. At the trial of this cause, the plaintiff to maintain the issues on her part joined, produced and offered to read in evidence to the jury the letters testamentary, granted to her by the orphans court of *Charles* county, as executrix of the last will and testament of the said *Thomas A. Davis*, deceased.

The defendant objected to the admissibility of said evidence, and insisted, that it was incumbent on the plaintiff, to enable her to recover in this action, to produce letters of administration on the personal estate of the said *Thomas A. Davis*; and prayed the court to instruct the jury, that they must find for the defendant, unless said letters of administration were produced, and that the production of letters testamentary to the plaintiff on the estate of said *Thomas A. Davis*, was not sufficient to entitle the plaintiff to a verdict. The court, (STEPHEN, C. J., and KEY, A. J.,) refused to grant said prayer, but were of opinion, and so instructed the jury, that the letters testamentary, so as aforesaid produced and offered to be read in evidence to the jury, were legally admissible to show the character in which the plaintiff sues in the present action; to which opinion of the court, and their instruction, the defendant excepted.

4TH EXCEPTION. At the trial of this cause, the plaintiff to support the issue joined on her part, offered in evidence to the jury the following single bill, dated the — day of — 1822, and the following record of a judgment founded thereon :

“*Joseph J. Wills* and *William Thompson*, administrators of *John B. Wills*, vs. *Elizabeth G. Davis*, executrix of *Thomas A. Davis*. *Charles* county court, March term, 1830. Debt. Judgment signed the 30th day of March 1830, for \$1469.08 debt, and \$2000 damages and costs. The damages to be released, &c. Cost \$8.18½

Test, JOHN BARNES, Clerk.”

Chapman, adm'r, vs. Davis, exc'x.—1846.

And then proved by *John B. Wills*, a competent witness, that in 1816, 1817, or 1818, the witness could not say which, *Samuel Chapman*, the defendant's intestate, applied to *John B. Wills, Sr.*, the father of witness, for a loan of \$1200, which he, the said *Chapman*, stated at the time to *John B. Wills, Sr.*, he wanted to borrow for the use of the vestry of *Port Tobacco* church, and that he, *Chapman*, could give him an order on the vestry of said church; the father of witness replied, that he would lend him the money, but on a suggestion from the witness, that he had better not have to do with so many persons, said that he would lend him, *Chapman*, the money, but would have nothing to do with the vestry. *Chapman* then offered to give him security, and on his engagement to do so, the said contract of loan was consummated, and the money on a subsequent day paid to *Chapman*, and a note was drawn by the said *Chapman*, with a certain *William Morris*, as security. This note remained so for some time, until the year 1822, when the said *John B. Wills, Sr.*, the obligee, required that the same should be renewed, or some other note substituted in the place of it; the witness was under the impression, that his father's motive in so requiring, was that he might include the interest due on said note in a new note; that accordingly the said *Chapman* called on witness, and asked him if he would become his surety, when witness replied, that he had better call on *Thomas A. Davis*, that he, the witness, did not wish to become surety for a debt due to his father. A short time after this, witness saw *Chapman*, and asked him whether he got *Davis* as his surety on the note or not, and *Chapman* replied he had. The plaintiff also proved by *William Morris*, a competent witness, that he was the said *Chapman's* security on the first note. The plaintiff also proved by *William Thompson*, a competent witness, that the plaintiff paid to him, as the administrator of *John B. Wills, Sr.*, the sum of \$1400.87, being the one-half of the judgment hereinbefore mentioned, for which he gave her a receipt; the plaintiff here rested her case.

The defendant then proved to the jury, by the said *William Thompson*, that the one-half of said judgment had been paid

Chapman, adm'r, vs. Davis, exc'x.—1846.

to him by the defendant, and the other half, being the sum of \$1400.87, by the said plaintiff; and then the defendant, for the purpose of proving to the jury, that on or about the 29th of July 1815, the said *Samuel Chapman* and *Thomas A. Davis* were members of the vestry of *Port Tobacco* church, and that they continued members of said vestry from the 29th of July 1815, to the time of their signing the note or single bill, in 1822, to the said *John B. Wills, Sr.*, so as aforesaid given in evidence to the jury by the plaintiff, offered parol proof, that the said *Davis* and *Chapman* were members of the said vestry in 1815, and remained so until the date of the said single bill, signed in 1822, so as aforesaid given in evidence to the plaintiff, and after; but the plaintiff, by her counsel, objected to the admissibility of said parol evidence, and insisted before the court, that the said facts could only be proved by a production of the record of the vestry, making said appointments of vestrymen, or on proof of their loss.

The plaintiff then proved by said witness, that in 1815, before and after *John Edelen*, late deceased, was the register of said church; and that there was an old record of said church kept by the said register; that sometimes the proceedings of said vestry were written on separate pieces of paper; that he does not know whether the appointment of vestrymen of said church was entered on said record, or what proceedings were entered thereon; that he, the witness, was not the register, and did not keep the said record: he also proved, that *J. C. Layman* was the register after the said *John Edelen*, and that *A. Bateman* was register after *Mr. Layman* was, and is register of said church. And the court being of that opinion, rejected the said parol evidence, and refused to suffer it to go to the jury; to which opinion of the court, and on their refusal to suffer said parol evidence to go to the jury, the defendant excepted.

The defendant then, for the purpose of letting in said parol evidence, proved to the jury, by the testimony of *Walter Mitchell*, who administered on the estate of *John Edelen*, in conjunction with *Eleanor H. Edelen*, the widow of said *John*, and which said *John Edelen*, it was admitted, was the register

Chapman, adm'r, vs. Davis, exc'x.—1846.

of said vestry in 1815; that no record or other papers relating to the church or vestry of said *Port Tobacco* church, were found by him among the papers of his said intestate, but he had made no search for that purpose. And also proved by *Aquilla Bateman*, the present register of said vestry of the said church, who proved, that he had been and was register of the said vestry since 1826, and that he had made search and inquiries, but never of the register who preceded him, or their administrators, and cannot find, and never has seen or found any record of the proceedings of said vestry in 1815;—but has inquired of some of the vestry since he was register,—or any other record of the proceedings of said vestry, prior to the 12th of April 1819. The plaintiff objected to the admissibility of the testimony of the said *Mitchell* and *Bateman*, for the purposes aforesaid, of letting in the parol proof, and the court sustained the said objection by plaintiff's counsel, and refused to permit the said parol testimony, or any part of it, to go to the jury aforesaid; to which opinion of the court, and to their refusal as aforesaid, to permit said evidence to go to the jury, for the purposes aforesaid, the defendant excepted.

The defendant then offered in evidence to the court the following original paper, having first proved the handwriting of both the said *Davis* and *Chapman* thereto :

“Saturday, July 29th, 1815. The vestry met agreeably to notice. Present, the *Rev. Mr. Weems*, *Samuel Hanson, Sr.*, *Samuel Chapman*, *William Vincent*, *Horatio Clagett*, *John Matthews*, *John T. Stoddert*, and *Henry H. Chapman*, who resolved, that in order to finish the church, the vestry, or those of them who will consent to the plan, will agree to complete the said church on their own responsibility, and in order to reimburse them in the necessary expenditure thereof, they do further resolve, that when the same shall be completed, the pews shall be sold to the highest bidder, without restriction on the purchaser as to the number of pews he may purchase; and also, that any benefit arising from the scheme of a lottery in favor of said church, shall exclusively vest in favor of those persons who may undertake to build the said church.

Chapman, adm'r, vs. Davis, exc'x.—1846.

“Resolved further, that any money, donation or subscription, or that may hereafter be subscribed, shall be payable to the persons who may undertake to build said church, it being understood that any balance due from the vestry shall be first paid out of the money already subscribed and not collected, or collected and not paid over to the vestry.

“Resolved, that to carry into effect the within resolutions, *Messrs. H. H. Chapman, John T. Stoddert*, are appointed our agents, for the purpose of managing the affairs of our lottery, with power to take such steps as to them may appear expedient to the final adjustment of the same, and that *H. H. Chapman* and *Samuel Chapman* shall negotiate any loan in the manner to them seeming best, which the vestry pledge themselves to repay on such terms as they may contract for the same.”

“We whose names are hereunto subscribed, do agree to exonerate *Samuel Hanson, Sen'r, Esq.*, and *John Matthews, Esq.*, from any responsibility arising from the foregoing resolutions.

John Weems, H. H. Chapman, Samuel Chapman, William Vincent, J. T. Stoddert, Horatio Clagett, Thomas A. Davis.

Resolved, that *Samuel Chapman, Horatio Clagett*, and *John T. Stoddert*, be a building committee, with power to contract for workmen, materials, and for the purpose of furnishing the church.”

For the purpose of proving that the said *Davis* and *Chapman* were members of the said vestry, at the time of the date hereof; but the court were of opinion that the said paper, so as aforesaid offered in evidence, was no evidence that *Davis*, whose name is signed, was a member of the vestry aforesaid at the time of the date thereof, and refused to suffer the same to go to the jury; to which opinion of the court, and their refusal to permit said paper to go to the jury, for the purpose aforesaid, the defendant excepted.

The plaintiff took an exception below, upon which this court did not act.

The defendant appealed.

Chapman, adm'r, vs. Davis, exc'x.—1846.

The cause was argued before ARCHER, C. J., DORSEY and MARTIN, J.

By T. F. BOWIE and ALEXANDER for the appellants, and
By CAUSIN and McMAHON for the appellees.

MARTIN, J., delivered the opinion of this court.

The principal question presented for the examination of the court in this case, is that which respects the validity of the plea in abatement, offered by the defendant to the amended declaration of the appellee, at the March term of *Charles* county court, 1842. And it is necessary to recur to the pleadings, for the purpose of understanding what was the predicament of the defendant below at the time he exhibited this plea in abatement.

It appears that the writ was issued on the 12th of March 1839. At the August term of the court in the same year, the plaintiff filed her declaration, to which the defendant pleaded *non assumpsit*. The cause was continued, under a general imparlance, until the August term 1841, when leave was obtained by the plaintiff to amend her declaration. This leave was not exercised, and was withdrawn at the March term 1842. At this term, the defendant filed his first plea in abatement, which was rejected by the court.

At the same term, the defendant tendered a demurrer to the declaration, but which the court refused to receive, unless the general issue was withdrawn. This plea was accordingly withdrawn, and the demurrer renewed and sustained. The plaintiff then, upon leave, amended her declaration, and placed the defendant under a rule to plead. At this point of time, the defendant tendered to the court a plea in abatement, similar to the one which he had before exhibited, and to which the court again entered a *ne recipiatur*. The plea alleges, as matter in abatement, a variance between the writ and declaration, in this respect: That the plaintiff sued out her writ as administratrix of *Thomas A. Davis*, and has declared as his executrix.

In this condition of the pleadings, the counsel for the appellee have contended, that this plea in abatement came too late, and that the county court committed therefore no error in re-

Chapman, adm'r, vs. Davis, exc'x.—1846.

jecting it. This objection to the plea is, we think, properly taken, and must be sustained.

In *Chamberlin against Hite*, 5 *Watts*, 374, the court say: "A plea in abatement cannot be put in after a general imparlance, and if the defendant wish to preserve his right to such plea, he must vary his form of prayer, by making it with the reservation of his right, and asking a special imparlance, which must be entered on the record. Nor can it be pleaded after a plea in bar, and if a plea in abatement is put in after a plea in bar, the plaintiff is not bound to reply to it. It ought to be pleaded within four days after the declaration has been delivered."

In *Wilson against Hamilton*, 4 *Sarg. & Raw.*, 239, it is declared, that a plea in abatement can never be pleaded after a plea in bar, unless the matter has arisen since the plea in bar, in which case it may, provided it be done the first opportunity that is presented, for a plea in bar waives only matter in abatement, then existing. 1 *John. Cas.*, 101.

Passages from these cases have been selected, as containing a clear and distinct statement of the acknowledged principle, that when the party has, by the character of his pleading, waived all objections to the capacity of the plaintiff, or any other abateable matter, then existing, he cannot be allowed to resume the objection. As the variance which the defendant has presented as pleadable in abatement, existed equally between the writ and original declaration, and the writ and the amended declaration, the amendment of the nar, and the rule to plead anew, could not in this respect change the rights of the parties. The matter relied on in abatement existed at the period when the plea in bar was filed, and although the leave granted to plead *de novo*, gives to the defendant the right to plead any plea to the action which he may select, it does not confer the right to raise dilatory objections, of which the party was aware when he exhibited his plea in bar, and which he had thus surrendered.

The objection next taken to the validity of this plea, that it was pleaded without demanding oyer of the writ, is equally fatal. This was the established practice in the *English* courts,

Chapman, adm'r, vs. Davis, exc'x.—1846.

and the right to plead in abatement, a variance between the writ and count, was therefore practically abolished, when *Lord Mansfield*, in the case of *Boats against Edwards*, in 1779, announced to the bar, that the practice, for the defendants to prayoyer of the original, which is so much used for delay, was not warranted by any principle of justice, and ought not to exist.

In *Holt against Finch*, 1 *Wil.*, 394, the court say: "Formerly, when the whole original writ was spread in the same roll with the count, if a variance appeared between the writ and count, the defendant might take advantage thereof, either by motion in arrest of judgment, writ of error, plea in abatement, or demurrer. But afterwards it was determined, that if the defendant will take advantage of a variance between the writ and count, he must demandoyer of the writ, and shew it to the court."

This practice appears to have been adopted in several of the *American* courts, where the first process is, as in *Maryland*, a *capias ad respondendum*. In the case of the *Bank of New Brunswick against Arrowsmith*, 4 *Hals.*, 284, the Chief Justice, after having examined the learning on this branch of the law, says: "From the view which has been taken of the practice in the court of *King's Bench*, to which the proceedings of this court have most nearly approached, and to which we have been accustomed to resort for precedent, when regulations of our own are wanting, it appears that at, and prior to the year 1776,oyer of the writ was constantly granted; and I am not aware that in this court the practice has since been abrogated or denied. The defendant may therefore avail himself of a variance between the writ and declaration, either byoyer and plea, as has been done in the present case, or by a motion to set aside the proceedings for irregularity."

In *Slocum against Slocum*, 8 *Watts*, 371, the court maintain the proposition, "that a variance between the writ and the declaration, could only be taken advantage of by craving and obtainingoyer of the writ, and then pleading the variance in abatement." The same doctrine is distinctly announced in *Chirac against Reinecker*, 11 *Wheat.*, 302, where the Supreme

Chapman, adm'r, vs. Davis, exc'x.—1846.

Court declare, that if in any case a variance between the writ and declaration can be taken advantage of by the defendant, it is an established rule, that it cannot be done except upon oyer of the original writ, granted in some proper stage of the cause.

It is certainly true, that in this State the writ is in court, and forms a part of the record, and bears in this respect no analogy to the practice of the *English* courts. But it is too narrow a view of the subject to suppose, that in demanding oyer of the writ, the only purpose is to place it on the rolls of the court, and to make it a part of the record. The writ, it has been determined is, without oyer, no part of the pleadings, or even the proceedings in the cause. And the object of craving and obtaining oyer of the writ may well be, to bring it to the view of the court, by making it a part of the pleadings, and thus putting the defendant in a situation to plead any variance that may exist between the writ and declaration, in abatement, or to file, according to some of the cases, a special demurrer. Although we consider, that the variance in this case between the writ and count, was a matter which the defendant could have pleaded in abatement, if he had presented the objection in due time, and in a properly constructed plea, the court below could not do otherwise than reject the plea, under the circumstances in which it was exhibited.

If this was a case in which the plaintiff could only have maintained an action in her individual capacity, the addition of the word "administratrix," might have been treated as a superfluous description. This is the language of the court in *Sasscer against Walker's Ex'ts*, 5 G. & J., 107. The Chief Justice says, "if the appeal bond, on which the suit was brought, was a contract on which the plaintiffs could sustain an action only in their individual, and not in their representative capacity, then the addition of the word executors, in the writ, might be construed and treated as a superfluous description, and not irregular, the demand being the same." But the case just referred to establishes the proposition, that upon the cause of action now under consideration, the plaintiff could have maintained an action, either in her personal or representative cha-

Chapman, adm'r, vs. Davis, exc'x.—1846.

racter, and having sued in the latter capacity, she was bound, we think, to sustain it. The result is, that if oyer of the writ had been prayed and granted, the pleadings would have presented a variance, of which the defendant could, at the proper time have availed himself, by plea in abatement.

It is perceived, from the fact of the court having addressed itself to this plea in abatement, that it is regarded as properly and legally forming a part of the record. The affidavits having shown, that a plea in abatement was tendered by the defendant below, immediately upon the declaration being amended, and a rule to plead laid, and that to this plea a *ne recipiatur* was directed by the court, it was the duty of the clerk to have entered these proceedings on the record of the court, and having omitted to do so, the record was properly corrected. While we are of opinion, therefore, that the court below, in directing an amendment of the record, in accordance with the fact, committed no error, we desire to be understood as expressing no opinion on the question, whether an order of this kind can be the subject of appeal?

The first and second exceptions have been abandoned.

It appears from the question presented by the *third* bill of exceptions, that after issue was joined, the plaintiff produced, and offered to read in evidence to the jury, the letters testamentary, granted to her by the orphans court of *Charles* county, as executrix of the will of *Thomas A. Davis*. As the issue was joined on the count, we can perceive no just objection to the admissibility of this testimony. The plaintiff declared as executrix, and it was certainly competent to show, by the testamentary letters, that she was entitled to the character she had assumed. We concur, therefore, with the court below in this exception.

The question presented by the *fourth* exception, relates to the admissibility of the parol evidence offered by the defendant, to prove that *Samuel Chapman* and *Thomas A. Davis*, were members of the vestry of *Port Tobacco* church, about the 29th of July 1815; and that they continued members of the vestry, from the 29th of July 1815, to the time of their signing the note, in 1822, to *John B. Wills*.

Chapman, adm'r, vs. Davis, exc'r.—1846.

The fact proposed to be proved by the defendant, was material to the issue, as the jury might have found from the position of *Davis*, as a member of the vestry, in connection with other testimony, that he intended to sign the note in question, not as the surety of *Chapman*, but as a principal obligor. And the right of the defendant to introduce this testimony, turned on the question, whether it was incumbent on him to produce the record of the vestry as the best evidence, that *Thomas A. Davis* was, at the period referred to, one of its members.

The object of the evidence was, to prove a continuing membership by *Davis*, from 1815 to 1822, and this is a fact which could be established by his acts. The proposition of the defendant must then have been, not to give evidence of the election or appointment of *Mr. Davis* as a member of the vestry, but to show by his acts and conduct, that he continued for the period referred to, to exercise the functions of a member of the vestry, and was a member. In this aspect of the case, we can perceive no objection to the introduction of the testimony.

In *Bevan against Williams*, 3 Term., 635, note a, the action was for non-residence, against a clergyman; and the single question was, whether the plaintiff, in order to maintain this action, must prove admission, institution, and induction? The plaintiff did prove several acts done by the defendant, as parson of the parish, such as receiving tithes, serving the church, and acting in other respects as parson. Upon this question *Lord Mansfield* said, "all evidence is according to the matter to which it is applied, and the person against whom it is used. Against a third person there might be some reason for the objection; but as against the man himself, his own letters, receiving tithes, and cutting timber on the glebe, are decisive."

We think, therefore, that it was competent for the defendant to prove, by parol evidence, that *Thomas A. Davis* acted as a member of the vestry, from 1815 to 1822, and that the court below erred in rejecting the testimony offered for this purpose.

The instrument of writing, set out in this bill of exception, as the paper of the 29th of July 1815, was clearly inadmissible. This paper, standing alone, furnished no evidence that *Thomas*

Hume, *et al.*, vs. Pumphrey.—1846.

A. Davis was a member of the vestry at its date, and the court below committed no error in rejecting it.

As it is apparent from the record, that the appellant, at the trial below, had not the benefit of the fact which he proposed to establish by parol evidence, that *Thomas A. Davis* was a vestryman of the *Port Tobacco* church in 1815, and from thence to 1822, and as we think the court erred in rejecting this testimony, the judgment of the county court will be reversed, and a *procedendo* awarded.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

BARBARA E. HUME, ET AL., vs. JOHN K. PUMPHREY.—*December* 1846.

In the year 1826, the owner of a negro slave conveyed her in trust for the sole and exclusive use of his daughter, during the time she may live and remain unmarried, or for life; and after her death or marriage, until such time as the eldest of her children shall come of age or be married, on which event the trustee was directed to convey the same absolutely unto the children of the grantor's daughter. The mother married again in 1842; and in 1844, the trustee conveyed the property to the grand-children. In an action of *trover* for the slave, brought by the grand-children a few days after the conveyance to them, and after demand and refusal, the defendant proved, that he had been in possession of the slave some five or six years, using and claiming her as his own, and that the trustee was frequently in the county where the defendant resided during that time. HELD, that this case was within that class of cases, where not only adverse possession and claim of title for the time limited by the act of Assembly, are necessary to bar the plaintiff's recovery, but it must be made appear to the jury, that such adverse possession and claim of the defendant, were known to the trustee three years before the institution of the suit.

Where a slave was conveyed in trust for the use of *A*, for life, and after her death the trustee was directed to convey the same to *B*, and neither the trustee, nor *B*, were entitled to the possession during the life of *A*, there can be no presumption of knowledge on the part of the trustee, that the claim or possession of another party claiming under *A*, was adverse to his right.

The defendant, by his examination of a witness in chief, proved, that the witness, as a constable, had sold the negro in controversy to him, and so in effect gave evidence of a sale under a *fi. fa.*, or some process of execution. Under such circumstances the plaintiff, by cross-examination of the

Hume, *et al.*, vs. Pumphrey.—1846.

same witness, will be permitted to give parol evidence of the undisclosed part of the contents of the *feri facias*.

APPEAL from *Prince George's* county court.

This was an action of *trover*, brought by the appellants against the appellee, on the 28th March 1844, for a negro woman called *Mary*, a slave for life. The defendants pleaded *non cul*, and limitations. The verdict was for the defendant.

In the trial of this cause, the plaintiffs to support the issues on their part, offered in evidence the deed from *Benjamin Berry* to *R. Beale*, as follows, to wit :

“This Indenture, made this 14th March 1826, between *Benjamin Berry*, of *Prince George's* county, *Maryland*, of the first part, and *Robert Beale*, of the city of *Washington* and *District of Columbia*, of the second part, and *Eleanor Berry*, the daughter-in-law of the said *Benjamin Berry*, and *Barbara Ellen Berry*, *Amanda Eugenia Berry*, and *Russia Rosalia Berry*, daughters of the said *Eleanor Berry*, and grand-children of the said *Benjamin Berry*, all of *Prince George's* county, of the third part, witnesseth, that whereas the said *Benjamin* is anxious to provide for the support and maintenance of his said daughter-in-law, and his said grand-children, (for which they are dependent on him, the said *Benjamin Berry*,) that is to say, for his said daughter-in-law, so long as she shall remain a widow and unmarried, and for his said grand-children, and their heirs, forever. Now this indenture witnesseth, that the said *Benjamin*, for, &c., hath given, &c., and by these presents do give, &c., unto the said ———, his heirs and assigns, all that tract or parcel of land, &c., together with all the negro slaves, &c., their increase, &c., all of which will more fully appear by the schedule hereunto annexed, marked A, situate, being and employed upon, and esteemed and taken as belonging to the said tract or parcel of land, and capital messuage; also a little negro boy named *Lemuel*, which lives upon the land where the said *Benjamin Berry* now lives, in trust, however, for the following purposes, and no other use, that is to say, that the said *Robert Beale* shall retain the legal title to all the said property, during the life and widowhood of the said *Eleanor Berry*, and after her death or marriage, until

Hume, et al., vs. Pumphrey.—1846.

such time as the eldest of her children shall come of age or be married, on which event or events, the said *Robert Beale* shall convey the unconditional title in fee to all the said property, both real and personal, unto the said children, and their heirs, or such of them as may be living at the time of such conveyance, and to the issue of any of such as may be dead, such issue to take under said conveyance in the same manner that they would take under the statute of distributions, in case the property were to be descended from an ancestor, dying at the time when such conveyance may and ought to be made; and the said *Robert Beale* shall permit the said *Eleanor Berry* to have and enjoy the sole and exclusive use of all the said property, for and during the time in which she shall and may live and remain unmarried. In witness whereof, the aforesaid parties of the first and second part have hereunto set their hands and seals, the day and year first above written.”

“A.—A schedule of the property as far as it can be remembered and referred to in the annexed deed, and called for as the property marked A: five negro men, viz., &c.; eleven negro women, *Mary*,” &c.

And proved, that negro *Mary*, the property in controversy, was the property originally of *Benjamin Berry*, grantor in the above deed, and the same negro *Mary* named in the schedule thereof; they further proved the marriage of *Eleanor Berry*, to whom the estate in the property mentioned in the said deed was given during widowhood, to have taken place in October 1842, and that the plaintiffs in this case were the parties named in the said deed to whom the said property, in the event of the death or marriage of the said *Eleanor*, was to belong; and further gave in evidence the deed of *Robert Beale*, to the plaintiffs in this case, in 1844, for the property in question. And that before suit brought, the plaintiffs demanded the said negro in controversy, and the defendant refused to deliver her up.

The defendant then proved by competent witnesses, that he had been in possession of the said negro since 1838 or 1839, using and claiming her as his own, and that *R. Beale*, the trustee mentioned in the deed, was frequently in the county,

Hume, *et al.*, vs. Pumphrey.—1846.

between that date and the institution of this suit; and prayed the court to instruct the jury, that if they find from the evidence that the defendant in this case had possession of the said slave in controversy, for more than three years next before the institution of this suit, using and claiming her as his own, then the plaintiffs were not entitled to recover; which opinion the court, (MAGRUDER, C. J.,) gave. The plaintiffs excepted.

2ND EXCEPTION. After the preceding exception had been taken, (the testimony in which it is agreed shall be taken as part of this,) the plaintiffs, in further support of the issues on their part joined, offered to prove by the cross-examination of *John R. Walker*, (who had been examined by the defendant, and who had stated, in answer to the defendant's interrogatory, that he had sold the said negro *Mary*, as constable, in the year 1837, to one *John T. Berry*, who had sold her to the defendant in 1838;) that said sale to *Berry* was made under a writ of *fieri facias*, in his hands, as constable, against the goods and chattels of *Eleanor Berry*, mentioned in the said deed, and that said defendant claims title to said negro, under his purchase from said *John T. Berry*; but the defendant's counsel objected to the evidence: the court, (MAGRUDER, C. J.,) sustained the objection, being of opinion that it was not competent to the plaintiffs to establish, by parol proof, any sale of said slave, in virtue of a *fieri facias*, without producing the said writ, or showing that it was not in his power to produce the same, although he had taken the steps required by law to enable him to produce it, or without accounting for the non-production of said *fi. fa.* To this opinion of the court, and their refusal to permit the testimony to go to the jury, the plaintiffs excepted.

The plaintiffs appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By TUCK and DIGGES for the appellants, and

By C. C. MAGRUDER for the appellee.

Hume, *et al.*, vs. Pumphrey.—1846.

DORSEY, J., delivered the opinion of this court.

The plaintiffs having proved their title to the negro slave, for the conversion whereof the present action of *trover* was instituted, and a demand and refusal before the institution of their suit, the defendant then proved, that he had been in possession of the said negro since 1838 or 1839, using and claiming her as his own; and thereupon prayed the court to instruct the jury, "that if they found from the evidence, that the defendant in this case, had possession of the slave in controversy for more than three years, next before the institution of this suit, using and claiming her as his own, then the plaintiffs were not entitled to recover." Which instruction the court gave, and the propriety of their having done so, forms the subject of appeal on the first bill of exceptions.

Whether a plaintiff, having both the right to the property and to its possession, during the period of such claim, user and possession, by a defendant, could successfully resist such a prayer as that made by the present defendant, which excludes from the consideration of the jury all enquiry as to the knowledge of the plaintiff, of such possession, user and claim, is a question upon which it is unnecessary, and therefore not intended by us, to express any opinion.

In this case, until within less than two years before the institution of this suit, neither the present plaintiffs, nor *Robert Beale*, the trustee, under whose conveyance they acquired their legal title, had any right to the possession of the negro in controversy. By the express terms of the deed of trust from *Benjamin Berry*, *Eleanor Berry* was "to have and enjoy the sole and exclusive use of all the said property, for and during the time in which she shall and may live and remain unmarried, without molestation or hindrance" of the said trustee. *Eleanor Berry's* interest in the property conveyed, terminated, by her marriage, in 1842, until when, *Beale*, the trustee, unless informed to the contrary, might naturally conclude, that the negro girl *Mary* remained in the possession of *Eleanor Berry*, or those rightfully claiming under her. A possession in another person, adversary to her rights or his own, he had no reason to anticipate, and his knowledge thereof, without proof, is not to

Hume, *et al.*, vs. Pumphrey.—1846.

be presumed. The facts submitted to the finding of the jury by the defendant's instruction, as granted by the court, might all be true, and yet not be any invasion of the possessory rights of the trustee, for which he could seek any legal redress. The defendant may have acquired, by purchase, the usufructuary possessive right of *Eleanor Berry*, and in virtue of such title, possessed, used, and claimed, negro *Mary* as his own. This case, therefore, falls clearly within that class of cases, where not only adverse possession and claim of title, for the time limited by the act of Assembly, are necessary to bar the plaintiff's recovery, but it must be made appear to the jury, that such adverse possession and claim of the defendant, were known to *Robert Beale*, the trustee of the plaintiffs, three years before the institution of this suit. It hence follows, that the county court erred in instructing the jury, as they in effect did, that three years possession of negro *Mary*, by the defendant using and claiming her as his own, before the commencement of the action, barred the plaintiff's recovery, whether their trustee had knowledge of such possession, user, and claim, or not.

In rejecting the testimony offered by the plaintiff's cross-examination of the defendant's witness, *John R. Walker*, as stated in the second bill of exceptions, we think the court below also erred. The defendant, by his examination of the witness in chief, having proved, that he, (the witness,) as constable, had sold negro *Mary* to *John T. Berry*, in 1837, who, in 1838, sold her to the defendant, thereby, in effect, gave evidence to the jury, that such sale was made under a *fieri facias*, or some process of execution. The plaintiffs, thus suddenly apprised of the existence of a written paper,—of which we cannot assume that they had any previous knowledge; or had then any means of producing; or had any reason to expect its being in any way referred to at the trial, and its contents partially given in evidence to the jury, and relied on by the defendant,—could not be expected to have taken the requisite steps to prove its contents, according to the strict requirements of law; or to enforce its production by a *subpœna duces tecum*; or if lost, destroyed or mislaid; or if in the possession of the defendant, to have laid a proper foundation for the proof of its contents by

 Lloyd vs. Burgess.—1846.

secondary evidences, and therefore, as well upon principles of reason and justice, as of law, ought to have been permitted to give in evidence the undisclosed part of the contents of the *feri facias*, by the same kind of testimony that the disclosed portion of the contents of the writ had, already by the defendant, been laid before the jury. Surprise and injustice would be the result, if a different principle were to prevail in many cases, in some respects similarly circumstanced. We dissent, therefore, from the county court's opinion, and refusal to permit the testimony offered by the plaintiff's cross-examination of the witness to go to the jury, as stated in the second bill of exceptions.

Dissenting from the county court on both bills of exceptions, their judgment is reversed. Let a procedendo issue.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN LLOYD, ADM'R OF THOMAS JANNEY, SURVIVOR OF J. D. BROWN, vs. TERESA BURGESS, ADM'X OF THOMAS BURGESS.—*December* 1846.

Upon a bond, reciting, "whereas the above bound *S* and *P* have obtained an injunction to stay proceedings at law, and judgment rendered against them in," &c., with condition to "prosecute the said writ of injunction with effect, and satisfy and pay, as well the judgment as all costs," &c., that shall accrue in the chancery court, or be occasioned by delay of the execution, &c., unless the court of chancery shall decree to the contrary, and shall, in all things, obey such order and decree as the court of chancery shall make in the premises, the obligors cannot plead in bar, that the parties did not obtain any injunction from the court of chancery.

A party administrator cannot deny in pleading, a fact, which his intestate has expressly admitted, under his hand and seal, in his bond.

A party is estopped from denying a fact recited in his deed.

The rejoinder of general performance to a replication, assigning breaches of a condition, is defective on general demurrer.

Courts of law, upon general demurrer, will give judgment against the party who commits the first error in pleading.

A plea in bar, to an action on an injunction bond, which set up as a defence to a breach of the condition, that after the writ of injunction obtained against two defendants, both prosecuted with effect their bill, until the

Lloyd vs. Burgess.—1846.

death of one ; that the survivor also prosecuted with effect, until his death ; that no administration had been obtained upon the estate of either, and that afterwards it was so proceeded in, that the said injunction was dissolved by the final order of the court of chancery, is no defence. The courts of law must consider the order of the court of chancery as regularly and legally passed, and will not assume, that the chancery cause abated by the death of the complainants, contrary to the allegation of the plea.

APPEAL from *Charles* county court.

This was an action of *debt*, commenced by the appellants on the 28th July 1840, upon the bond of *Thomas Joseph Speake*, *Edward Pye*, *Thomas Burgess*, and *William S. Jones*, to *Thomas Janney* and *John D. Brown*, dated 18th August 1819, with condition as follows :

“Whereas the above bound *Thomas Joseph Speake* and *Edward Pye* have obtained an injunction to stay proceedings at law, and judgment rendered against them in *Charles* county court, by the above named *Thomas Janney* and *John D. Brown*, for the sum of \$2911.95, and costs. Now the condition of the above obligation is such, that if the said *Thomas Joseph Speake* and *Edward Pye* shall prosecute the said writ of injunction with effect, and satisfy and pay as well the said sum of money and costs, as all costs, damages and charges that shall accrue in the chancery court, or be occasioned by the delay of execution on the said judgment, unless the court of chancery shall decree to the contrary, and shall, in all things, obey such order and decree as the chancery court shall make in the premises, then the above obligation to be of none effect, else,” &c.

After oyer, the defendant pleaded general performance, and the plaintiff assigned his breaches, by way of replication, in substance as follows :

1st. That after the making of the said writing obligatory, the said *Thomas Joseph Speake* and *Edward Pye* did not, nor did either of them, prosecute with effect the said writ of injunction in the recital and condition of said writing obligatory mentioned, contrary to the form and effect of the said condition of said writing obligatory, whereby the said plaintiff had sustained damage to the value of six thousand dollars, current money, to wit, at *Charles* county aforesaid, and this, &c.

Lloyd vs. Burgess.—1846.

2nd. That after the making of the said writing obligatory, the said *T. J. S.* and *E. P.*, in the recital and condition thereof named, did not, nor did either of them, satisfy and pay the said sum of money, to wit, \$2911.95, and costs, in the said recital and condition of said writing obligatory mentioned, or any part thereof, whereby the said plaintiff has sustained damage to the value of six thousand dollars, current money, &c.

3rd. That after the making of the said writing obligatory, the said *T. J. S.* and *E. P.*, in the recital and condition thereof named, did not, nor did either of them, satisfy and pay all costs, damages and charges, occasioned by the delay of execution on the said judgment, in the said recital and condition of said writing obligatory mentioned, whereby the said plaintiff has sustained damage to the value of six thousand dollars, current money, and this the said plaintiff is ready to verify, &c.; wherefore, &c.

The defendant rejoined as follows :

1st. That *E. P.* and *T. J. S.* did not obtain an injunction in the court of chancery to stay proceedings at law upon the judgment rendered against them, recited in said bond, nor to stay proceedings at law upon any other judgment, &c.

2nd. That *E. P.* and *T. J. S.* did not obtain an injunction in the court of chancery to stay proceedings at law upon any judgment obtained in *Charles* county court, by, &c., and could not, and did not, prosecute the same in the said court of chancery; and that the said court did not make any order or decree in or touching said judgment at law, and that no proceedings were had been between the said parties in the said court of chancery, and so the said bond is void, &c.

3rd. That according to the said condition, the said *T. J. S.* and *E. P.*, and *T. B.*, and *W. S. J.*, became, and were bound to prosecute with effect a certain injunction, then to be obtained in the court of chancery, to stay proceedings at law upon, &c., and to pay, &c.; and so the defendants in fact say, that the said writing obligatory, &c., is an injunction bond given, to take effect upon the obtaining of an injunction by the said, &c., to stay proceedings at law upon a certain judgment obtained, &c., and that neither *T. J. S.*, nor *E. P.*, &c.,

Lloyd vs. Burgess.—1846.

have obtained any such injunction, nor have any proceedings to delay execution upon the said judgment been had by him in the court of chancery; and so not their bond.

4th. That they, &c., did not obtain an injunction from, &c., nor institute any proceedings in chancery; nor did the court of chancery make any order or decree in the premises, and so the performance of the condition became, and was, and still is, impossible.

5th. General performance.

6th. *Plene administravit*, of the estate of *Thomas Burgess*.

7th. That while the said *T. J. S.* and *E. P.* were alive, they did well and truly prosecute said injunction, and did, in all things, stand to, obey, and perform, each and every order and decree of the court of chancery, mentioned in the said condition, until afterwards, to wit, on the — day of June, eighteen hundred and —, when the said *J. T. S.* departed this life; and that after his death, the survivor, *E. P.*, did, during his life, well and truly prosecute said injunction, and did, in all things, stand to, obey, and perform, each and every order and decree of the court of chancery in the premises; that afterwards *E. P.* died; and that it was afterwards so proceeded in said injunction, that after the death of *T. J. S.* and *E. P.*, the said writ of injunction was dissolved by final order of the court of chancery, of 27th March 1840, and this, &c.

The plaintiff demurred generally to the 1st, 2nd, 3rd, 4th, and specially to the 7th, rejoinders of the defendant.

The 5th rejoinder was denied generally, with an assignment of breaches, as in the 1st plea.

Issue was joined on the 6th rejoinder.

The defendant joined in demurrer, and also demurred to the surrejoinder to the 5th rejoinder.

After this the defendant prayed leave to amend his 7th rejoinder, and rejoined anew:—

“That while the said *T. J. S.* and *E. P.* were alive, they did well and truly prosecute with effect said injunction, and did, in all things, stand to, obey, and perform, each and every order and decree of the court of chancery mentioned in the said condition, and then proceeded to make the averments as in the

first 7th rejoinder, filling up the blanks left in that plea;" and "that at the time when the said injunction was dissolved, there was no administrator or executor of the said *S.* or *P.* in existence."

To this amended rejoinder the plaintiff demurred generally.

The county court sustained the 1st, 2nd, 3rd, 4th, 5th, and the 7th amended rejoinders, as valid bars to the plaintiff's action, and rendered final judgment for the defendant.

The plaintiffs appealed.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By CAUSIN and J. J. LLOYD for the appellants.

No counsel appeared for the appellee.

SPENCE, J., delivered the opinion of this court.

This was an action of *debt* on a bond: the declaration was in the usual form, to which the defendant pleaded general performance: the plaintiff replied, and assigned breaches.

To the plaintiff's replication, the defendant pleaded seven separate pleas, by way of rejoinder, and to all of the defendant's pleas, by way of rejoinder, the plaintiff filed demurrers, except the fifth.

The bond, on which this action is brought, recites, "whereas the above bound *Thomas Joseph Speake* and *Edward Pye*, have obtained an injunction to stay proceedings at law, and on a judgment rendered against them in *Charles* county court, by the above named *Thomas Janney* and *John D. Brown*," &c., and the condition of the bond is, "that the said obligors shall prosecute the injunction with effect, and satisfy and pay, as well the said sum of money and costs, as all costs, damages and charges, that shall accrue in the chancery court," &c.

The defendant's first four pleas, by way of rejoinder, are each of them obnoxious to the same fatal infirmity, namely, they, each of them, deny a fact which the defendant's intestate has expressly admitted under his hand and seal, in his bond. In the recital of the bond it is said, "that the obligors, *Speake*

Lloyd vs. Burgess.—1846.

and *Pye*, have obtained an injunction to stay proceedings at law," and in each of these pleas, by way of rejoinder, this fact is denied. The law is clearly settled upon authority, that a party is estopped from denying a fact recited in his deed.

Lord Denman, C. J., in the case of *Bowman vs. Taylor and others*, 29 *Eng. Com. Law Rep.*, p. 90, in his opinion, uses this language: "As to the doctrine laid down in *Co. Litt.*, 352 B., that a recital doth not conclude, because it is no direct affirmation: the authority of *Lord Coke* is a very great one; but still, if a party has, by his deed, recited a specific fact, though introduced by 'whereas,' it seems to me impossible to say, that he shall not be bound by his own assertion, so made under seal." *Vide Fridge vs. State, use of Kirk*, 3 G. & J., 114. *Lainson, ex'tr of Owen Griffiths, vs. Tremere*, 28 *Eng. Com. Law*, 214. *Shelley vs. Wright, Wille's Rep.*, 9.

The defendant's fifth plea, by way of rejoinder, is nothing more than a repetition of her plea of general performance, and in nearly the same words, and is, therefore, no answer to the plaintiff's replication; neither does it traverse or avoid the breaches assigned in the replication. This would have been a good ground of demurrer, but the plaintiff, instead of demurring, filed his surrejoinder thereto, and again assigned a breach of the bond, to wit: "that the said *Speake* and *Pye* did not, nor did either of them, prosecute with effect the said writ of injunction," &c. To this surrejoinder the defendant demurred, and the court sustained her demurrer.

In this, we think, the court erred, and as it is a well established rule, that courts of law will give judgment against the party whose pleading is first bad, and as we think the defendant's fifth plea was unquestionably defective, therefore the demurrer should have been overruled.

The defendant's seventh plea, to which the plaintiff also demurred, is neither an answer as to the plaintiff's replication, or a bar to his action, and the matter which it sets up, by way of defence, shows conclusively the breach of the bond assigned by the plaintiff. It, in substance, avers, that the said *Speake* and *Pye*, during their joint lives, and the life of the survivor of them, "did well and truly prosecute with effect said injunction,

Lloyd vs. Burgess.—1846.

and did, in all things, stand to, obey, and perform, each and every order and decree of the chancery court," &c., until the death of the said *Speak* and *Pye*; and "that it was so proceeded in said injunction, that after the death of the said *Speak* and *Pye*, the said injunction was dissolved by a final order of said court, passed on the 27th day of March 1840;" the plea avers, that at the time of the dissolution of the injunction, "there was no administrator or executor of said *Speak* or said *Pye*, in existence." The matter set up in this plea as a defence, shews clearly the forfeiture of the condition of the bond, and the plaintiff's right of action. The condition of the bond is, that the said *Speak* and *Pye* "shall prosecute the said injunction with effect:" the allegation in the plea is, "that it was afterwards so proceeded in said injunction, that after the death of said *Speak* and *Pye*, that said injunction was dissolved by final order of said court, passed," &c. This court must consider the order of the chancery court as regularly and legally passed in the cause. "The judgment of a court of competent jurisdiction, when coming incidentally in question in any other court, is conclusive upon the question decided, and cannot be impeached, on the ground of informality in the proceedings, or error or mistake of the court in the matter on which they have adjudicated." This is the language of the court in *Raborg vs. Hammond*, 2 H. & G. 50. *Bowie vs. Jones*, 1 G. R., 214.

This case is manifestly distinguishable from the cases cited and relied on by the defendant's counsel. The case in *Carthew*, 519, *Duke of Ormond vs. Birely*, which seems to be the leading case on this point, shews very clearly the grounds of the decision, namely, "that the suit abated by the death of the obligor, in the replevin bond, before judgment;" for the court say, there was neither *non suit*, or verdict against the plaintiff in replevin. The case in 14th Mass. R., 231, *Janney vs. Janney*, was decided upon the ground, that the suit abated before judgment in the appellate court. But the plea in this case does not aver that the suit abated, but on the contrary, "that it was so proceeded in, that said injunction was dissolved by final order of said court, passed on the 27th day of March 1840."

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Barry, *et al.*, vs. Crowley.—1846.

PATRICK CROWLEY vs. SAMUEL M. BARRY AND JOHN HURST.—PATRICK CROWLEY vs. JAMES A. SANGSTON AND GEO. E. SANGSTON.—December 1846.

In an action by an endorsee against the payee and endorser of a negotiable note, the maker is a competent witness to prove the execution of the note by himself and partners, as makers, and the endorsement by the defendant. By the act of 1837, ch. 253, the legislature designed, as to the mode of proof of demand, and notice, to place foreign and inland bills upon the same footing; and, as regarded inland bills and notes, to dispense with the necessity of producing oral proof of demand and notice, by substituting therefor the protest of the notary, duly made.

In the case of foreign bills, the protest of a notary, duly authenticated by his seal, is received as proof of demand and notice, as therein stated.

When a protest, or an authenticated copy thereof, is offered in evidence, it must be received on the footing of the *lex fori*, and the only enquiry is, whether the protest has been duly made?

When a protest states, in substance, a demand on the drawer, and notice of non-payment, it is sufficient in point of form.

When the the court can perceive that a seal is attached thereto, the protest is sufficiently authenticated; neither the seal, nor the signature of the notary, need be proved.

Where it was in proof, that the defendant had directed his letters to be sent to *M*, where he had an agent who would deliver letters, there arriving, to him; and it was also in proof, that the defendant received letters at a post office four miles nearer his residence than *M*, he cannot set up, the want of due diligence, in sending his notices of protest to him at *M*.

The protest of a promissory note of *W & S*, dated, payable, and protested at the city of *Washington*, which certified, that the notary demanded payment of it from *W*, one of its makers, and was answered, *C* has to pay it, we cannot, and that on the same day he deposited in the post office notice of protest to *C*, (the endorser,) at *M*, states a sufficient demand and notice to bind *C*.

W, S, D & C, agreed to sell to *C* all the books, debts, credits, &c., of the firm of *S & W*, and of the firm of *D & S*, estimating the same at \$4526, for ten dollars in cash, and certain outstanding, enumerated notes of the two firms, amounting to \$5153.75, and *C* bound himself to pay said notes when due. In an action upon one of said notes of *S & W*, against *C*, the endorser, by the holder thereof, he proved, that he had already obtained judgment against *S*. HELD, that this agreement did not render *S* an incompetent witness in the cause, for the plaintiff. If the witness was compelled to pay the note, he could recover upon the agreement against *C*, and by paying the judgment against him, he would not be entitled to an assignment of it, as he was not a security for *C*.

The declaration alleged, that a note on which the suit was brought, was made at the county aforesaid, when the note in fact was dated at the city of *W*; this is no variance.

The place where a note is dated, is clearly immaterial.

Barry, *et al.*, vs. Crowley.—1846.

APPEALS from *Prince George's* county court.

These were actions of *assumpsit*, brought by the appellees against the appellants, argued together in this court.

In the first cause, No. 10, the claim arose on the following note and protest :

“\$309.30. WASHINGTON CITY, 16th March 1842.

Nine months after date, we promise to pay *P. Crowley*, or order, three hundred and nine dollars and thirty cents, for value received. WALL & SASSCER.”

Endorsed, “*P. Crowley, Barry & Hurst.*”

“DISTRICT OF COLUMBIA, *Washington county, sct.* Be it known, that on the 19th December 1842, I, *Thomas Corcoran*, notary public for the county aforesaid, residing in said county, duly commissioned and sworn, at the request of the president and directors of the *Bank of the Metropolis*, presented to *Mr. Wall*, one of the drawers, the original note, whereof the above is a true copy, and demanded of him payment of the sum of money in the said note specified, whereunto he answered, ‘*Mr. Crowley* has to pay it.’ On the same day, I deposited in the post office, *Washington*, notice of protest to *P. Crowley, Upper Marlborough, Md.*, and to each of the other endorsers, enclosed to *R. Mickle, Esq., cash’r, Balto., Md.* Wherefore I, the said notary, at the request aforesaid, do hereby protest against the drawers and endorsers of the bill aforesaid, and all persons liable for, or chargeable with, the sum of money in the said bill specified, for as well the same sum of money, as for all legal interest, damages, costs and charges, which have accrued, or which may accrue, by reason of the non-payment of said sum of money, according to the tenor of the said bill. Thus done and protested on the 19th day of December 1842. In testimony whereof, I have hereto set my hand, and affixed (Seal.) my notarial seal of office.

THOS. CORCORAN, Notary Public.”

“Cost of protest, \$1.75.”

1ST EXCEPTION. At the trial of this cause, the plaintiffs, in support of the issues joined on their part, offered to prove by *William B. Sasscer*, that the note on which this suit is brought, was made by the firm of *Wall & Sasscer*, the witness, and one

Barry, *et al.*, vs. Crowley.—1846.

Sam'l T. Wall, being the members of said firm; and that the said note was endorsed by the defendant. But the defendant objected to the testimony of said witness, on the ground that he was one of the makers of the said note, and incompetent as a witness to charge the defendant. The court, (MAGRUDER, C. J.,) overruled this objection, and permitted the testimony of said witness to go to the jury. The defendant excepted.

2ND EXCEPTION. In addition to the testimony contained in the preceding exception, and which is, by agreement, made part of this, the plaintiffs, to prove that the said note had been duly presented for payment to the makers, and that notice of demand and non-payment was duly given to the defendant, offered in evidence the note and protest aforesaid.

And further proved by the said *William B. Sasscer*, that the defendant, in the spring or summer of the year 1842, requested him, if he had any business with him, the defendant, to address him by letter at *Upper Marlborough*, and his letters would be sent to him, when he could not call for them.

The defendant then proved, that at the time that the said note became due, he resided within a few miles of the *Long Old Fields*, where a post office was kept; and that *Upper Marlborough* was four miles further from the residence of the defendant, than the post office at the *Long Old Fields*.

The plaintiffs then proved by competent testimony, that *Upper Marlborough*, the place to which the defendant directed that his letters on business from said *Wm. B. Sasscer* should be sent, is, and was, the county town at the time, where a post office is and was kept, and where the defendant had a brother-in-law living at the time, and by whom, as the defendant told the witness, his letters as aforesaid would be sent him, the defendant, when he did not call for them himself.

The defendant prayed the court to instruct the jury, that upon all the evidence offered, if believed by the jury, the plaintiffs were not entitled to recover: because the said protest, as offered in evidence, was not admissible or sufficient to prove demand for payment of the said note upon the makers thereof, and of non-payment, and of notice to the defendant of such demand and non-payment.

Barry, *et al.*, vs. Crowley.—1846.

But the court, (MAGRUDER, C. J.,) refused the instruction. The defendant excepted.

3RD EXCEPTION. In addition to the evidence contained in the preceding exceptions, which, by agreement, is made part of this, the defendant proved, that the partnership of *Wall & Sasscer* was dissolved in March 1842; that public notice thereof was given in the *National Intelligencer*, a paper published in *Washington*, in the *District of Columbia*, and that the settlement of the partnership concerns devolved on the said *William B. Sasscer*, who continued to reside in the city of *Washington*, where the note was made, until after December, in the year 1842. The plaintiffs then proved, that they do now reside, and did reside, in the city of *Baltimore*, in *Maryland*, during the whole of the year 1842; and thereupon the defendant prayed the court to instruct the jury, that if they find from the evidence, that the partnership was dissolved at the time the said note became due, that public notice was given, as aforesaid, of said dissolution, that the settlement of the business of the firm devolved on the said *William B. Sasscer*, that he resided in *Washington* when the note became due, and that the demand was made on *Wall* alone, that the plaintiffs have failed to prove such a demand and notice to the endorser as entitle them to recover, and their verdict must be for the defendant. The court refused to give the instruction as prayed. The defendant excepted.

4TH EXCEPTION is omitted.

The action in the second appeal, No. 6, was founded upon the following note and protest :

“Dolls. 1204.85.

WASHINGTON CITY, *March 16th*, 1842.

Eight months after date, we promise to pay *P. Crowley*, or order, twelve hundred and four dollars, eighty-five cents, value received.

WALL & SASSCER.”

Endorsed, “*P. Crowley, J. & G. E. Sangston & Co., Wm. Tiffany.* Pay *R. Smith*, cash., or order.

R. MICKLE, Cash.”

Barry, *et al.*, vs. Crowley.—1846.

“DISTRICT OF COLUMBIA, *Washington county, sct.* Be it known, that on the 19th November 1842, I, *Thomas Corcoran*, notary public for the county aforesaid, residing in said county, duly commissioned and sworn, at the request of the president and directors of the *Bank of the Metropolis*, presented to *Mr. Wall*, one of the drawers, the original note, whereof the above is a true copy, and demanded of him payment of the sum of money in the said note specified, whereunto he answered, ‘*Mr. Crowley will pay it, we cannot.*’

“On the same day I deposited in the post office notice of protest to *P. Crowley, Upper Marlborough, Maryland*, and to each of the other endorsers, enclosed to *R. Mickle, Esq., cash., Baltimore, Maryland.*

“Wherefore I, the said notary, at the request aforesaid, do hereby protest against the drawers and endorsers of the note, aforesaid, and all persons liable for, chargeable with, the sum of money in the said note specified, for as well the same sum of money, as for all legal interest, damages, costs, and charges, which have accrued, or which may accrue, by reason of the non-payment of said sum of money, according to the tenor of the said note. Thus done and protested on the 19th day of November 1842. In testimony whereof, I have hereto set my

(Seal.) hand and affixed my notarial seal of office,

THOMAS CORCORAN, Notary Public.”

“Cost of protest, \$175.”

5TH EXCEPTION. After the preceding testimony had gone to the jury, which by agreement is made part of this exception, the defendant offered in evidence to the court and jury, the following paper :

“WASHINGTON, *July 22nd, 1842.*

“We, the undersigned, do hereby sell and assign all the books, papers, debts, credits, and evidences of debts and credits of *William B. Sasscer* and *Samuel T. Wall*, by the name of *Sasscer & Wall*, and of *William L. Dixon* and *William B. Sasscer*, by the name of *Sasscer & Dixon*, to *Patrick Crowley*, in consideration of the sum of ten dollars, current money, said debts, credits, and evidences of debts and credits, amounting in gross to about the sum of \$7000; the

Barry, *et al.*, vs. Crowley.—1846.

price agreed upon is the sum of \$4526, valuing the same at sixty-two cents in the dollar. The terms of payment are, ten dollars cash, the balance to be paid by the payment, when due, of certain notes of *William B. Sasscer* and *Samuel T. Wall*, by the name of *Wall & Sasscer*, to become due and payable at the times, in the amounts, and to the persons and firms following:—*Jas. A. & Jas. E. Sangston*, November 19th, 1842, \$1204.85. *William Henry*, October 19th, 1842, \$312.97. Same, December 19th, 1842, \$312.77. *Barry & Hurst*, October 19th, 1842, \$309.30. *Edward Pittman & Co.*, August 18th, 1842, \$698.75. Same, October 18th, 1842, \$698.75. Same, December 18th, 1842, \$698.75. Same, February 18th, 1843, \$698.75. *Jas. A. & J. E. Sangston*, December 30th, 1842, \$218.57. Amounting in all to \$5153.75. Said *Crowley* hereby binds himself, in consideration of said sale, to pay said notes when due, to the holders thereof.—Said *William B. Sasscer* and *Samuel T. Wall*, and *William L. Dixon*, have received,—which is hereby acknowledged,—the said sum of ten dollars.

SAM'L T. WALL.

WILLIAM B. SASSCER.

WILLIAM L. DIXON.

P. CROWLEY. "

Which he proved by the said *Sasscer*, was executed by the parties whose names are thereto signed, with the knowledge and consent of the plaintiffs in this cause; and also proved by the records of *Prince George's* county court, that the said plaintiffs have already obtained a judgment against the said *Sasscer*, upon the very note on which this suit is brought.

The defendant's counsel had informed the court and the plaintiffs' counsel, in the commencement of said *Sasscer's* examination, that other objections than the one presented by the first exception would be made to his competency, on the ground of interest, in the course of the trial, when the defendant came to offer his proof, and the court said, that it would be competent for him to do so. And thereupon the defendant insisted, that the said *Sasscer* was incompetent as a witness in this cause, for the plaintiff, because he was interested in pro-

Barry, *et al.*, vs. Crowley.—1846.

curing a judgment against the defendant in this cause; as he was liable to the plaintiffs on the judgment against him; and if he were made to pay the same, he would be entitled to an assignment of the judgment against the defendant, obtained in this cause. And prayed the court to exclude from the jury, all the testimony of the said *Sasscer*. But the court, (MAGRUDER, C. J.,) were of opinion that he was a competent witness, notwithstanding the execution of said paper, and refused to exclude his testimony. To which opinion of the court, and the refusal of the court to exclude the testimony of said *Sasscer*, the defendant excepted.

6TH EXCEPTION. Upon all the testimony in the preceding exceptions, which, by agreement, is made part of this, the defendants insisted, that the plaintiffs could not recover under the pleadings in this cause, because of a variance between the declaration and the proof, in this, that the declaration does not state the note to have been made at *Washington* city, to wit, at the county aforesaid, and does not aver, that the presentment and demand of payment of the maker, was made in *Washington* city, to wit, at the county aforesaid. And also, in this, that the presentment and demand is alleged to have been made of *Wall & Sasscer*, whereas no demand is proved to have been made of said *Sasscer*, but of *Wall* alone, after the said partnership was dissolved; and prayed the court to instruct the jury accordingly; but the court, (MAGRUDER, C. J.,) overruled the objections, as to variance between the pleadings and proof, and refused to give the instruction as prayed. To which opinion of the court, and their refusal of the instruction, as prayed, the defendant excepted.

The defendant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, and MARTIN, J.

By DIGGES and TUCK, for the appellant, and

By C. C. MAGRUDER and J. JOHNSON for the appellees.

Barry, *et al.*, vs. Crowley.—1846.

ARCHER, C. J., delivered the opinion of this court.

This, (No. 10, the first appeal,) is a suit by the endorsee of a note against the endorser and payee, and the question arising on the first bill of exceptions is, whether the maker of the note is a competent witness for the plaintiff, to prove the execution of the note by himself and partner, as makers, and the endorsement by the defendant? The witness was answerable, in any possible event of the suit, for the amount of the note, and could therefore have no interest in its event. He may, indeed, be considered as testifying against his interest, for if the plaintiff should recover, he would be answerable to the defendant for the costs of this suit. It has accordingly been often adjudged, that in the like circumstances the maker of a note is a competent witness. 1 *Greenl. Ev.*, 430, note 2, and authorities there cited.

The only question raised in the second exception is, whether the protest offered, was evidence to prove demand and notice?

By the act of 1837, ch. 253, relating to promissory notes and bills of exchange, a protest by a notary public, duly made, shall be *prima facie* evidence, in the case of inland and foreign bills, of non-payment or non-acceptance, and of presentment for payment and acceptance, at the time and in the manner stated in the protest; and the act further declares, that when such protest shall state, that notice of such non-payment or non-acceptance has been sent or delivered to the party or parties to such note or bill, and the manner of such notice, such protest shall be *prima facie* evidence, that such notice has been sent or delivered in the manner therein stated. The design of this act of the legislature, as to the mode of proof, of demand and notice, was to place foreign and inland bills upon the same footing, and as regarded inland bills and notes, to dispense with the necessity of adducing oral proof of demand and notice, by substituting therefor the protest of the notary, duly made. And as in the case of foreign bills, the protest of a notary, duly authenticated by his seal, was, before the act, received as proof of these facts, we should not be carrying out the intention of the law makers, unless we also received the certificate of the notary, authenticated by his seal, as proof of the demand and

Barry, *et al.*, vs. Crowley.—1846.

notice stated therein. The act, in its terms, is too imperative to admit of any doubt. When the protest, or an authenticated copy thereof, is offered in evidence, it must be received on the footing of the *lex fori*, 2 *Hill N. Y. Rep.*, 230; and the only enquiry, therefore, would seem to be, whether the protest has been duly made? This enquiry involves two considerations, its form, and its mode of authentication. To its form, no available objections could be urged; in substance, it states a demand on the drawer, and notice of non-payment. As to its mode of authentication, it is sufficient that we can perceive a seal to be attached thereto. No proof is necessary, that the seal attached is the notary's seal, or that the handwriting signed thereto, is the proper signature of the notary. Much ingenious reasoning has been urged before the court, to establish the invalidity of the protest, offered in evidence, upon the ground, that the seal of the notary does not contain the inscriptions pointed out by the act of 1801, ch. 86, sec. 7. Without determining whether this would be important or necessary, had the protest been made by an officer of this State, it is only necessary to say, that the protest was made beyond the limits of the State, by a notary, in no manner bound to provide a seal of the peculiar designation, which might be required for our own officers. In 2 *Hill*, 228, the certificate of the notary was rejected, because it had, according to the common law, no seal attached to it, and because there was no proof of the law of the State where the protest was made, that it was sufficiently authenticated. But we could not reject this protest upon the ground urged, without, at the same time, subjecting all protests, where-soever made, of even foreign bills, to the same rule.

But it is further urged, that the protest is inadmissible and insufficient to prove demand and notice, upon the ground that notice was not sent to the defendant at his nearest post office. The notice was sent to *Upper Marlborough*, to which office it is in proof, that the defendant had directed the witness to send him letters; at which place, it is proven, he had an agent, who would deliver letters there arriving to him. It is also proven, that he received several letters at a post office four miles nearer his residence. The defendant had, therefore, from the

Barry, *et al.*, vs. Crowley.—1846.

proof, two post offices, to either of which it would have been sufficient to have sent the notice of protest; he could not say that due diligence had not been used, when letters were sent to the post office where the defendant had directed letters from his copartner to be sent, and from which direction, it is reasonable to presume, he would, having an agent in the town, more readily and speedily receive them, than if sent to the post office nearest to him.

The third exception raises the question, whether a demand ought to have been made on both the drawers of the note, who were partners, and who had dissolved their partnership, and given notice of such dissolution in a paper printed in the city of *Washington*? It might be sufficient to say, that this dissolution had, by no evidence in the cause, been brought home to the knowledge of the holder of the note. But we do not desire to determine the question on this ground, because we are clearly of opinion, that a demand on one of the partners was sufficient, as each partner represents the partnership. Before a dissolution, it clearly would not be necessary to make a demand on both; *Story Prom. No.*, 285, nor could it be necessary after a dissolution, as the partnership, as to all antecedent transactions, continues until they are closed.

The above views dispose of all the questions presented for our consideration in the appeal No. 10, and in No. 6, the second appeal; except the questions arising on the fifth and sixth exceptions in No. 6.

We cannot perceive that the introduction of the agreement, between *Sasscer*, *Wall*, *Dixon* and *Crowley*, into the case, (by which the latter undertook to pay certain liabilities of *Sasscer* and *Wall*, among the rest the note in controversy,) should exclude *Sasscer* from being a witness. If *Sasscer* was compelled to pay the amount of the note, his remedy against *Crowley*, the defendant, would be by an action on the agreement, just adverted to. By paying the judgment, the witness would not be entitled to an assignment of the judgment, as his relation to the plaintiff in such judgment was that of a principal, and not a security for *Crowley*.

Barry, *et al.*, vs. Crowley.—1846.

The only variance alleged in the sixth exception, to which we need advert, is, that the nar alleges the note upon which the suit was brought, to have been “made at the county aforesaid,” when the note shows, that it bore date at the city of *Washington*; and it is insisted, that the declaration should have averred, that the note “was made at the city of *Washington*, to wit, at the county aforesaid.” In *Robert vs. Harnage*, 2 *Lord Ray*, 1043, a bond dated at *Fort St. Davids*, in the *East Indies*, was declared upon as a bond made at *London*. It was decided, that there was a variance. The same decision was made in *Mostyn vs. Fabrigas*, *Cowp.*, 176. These decisions appear to have been followed in *New York* and *Massachusetts*. 13 *John. Rep.*, 450. 5 *Pick.*, 412. There have, however, been contradictory decisions. In *Houriet, et al., vs. Morris*, 3 *Campb.*, 303, it was decided, that the contract evidenced by a promissory note is transitory, and the place where it purports to be made is immaterial, and it was held to be no variance; and the same doctrine is laid down in 1 *Stephen’s N. P.*, 773, 774. But that when the place of payment was stated in the body of the note, it made a material part of the instrument. *Roche vs. Campb.*, 3 *Camp. N. P.*, 248. *Chitty*, in his forms of pleading, adopts the doctrine of *Lord Ellenborough*, and his forms conform to those decisions. 2 *Chitty’s Plead.*, 115, 116, 117, 118; 9 *Am. Ed.* In *Chitty on Bills*, 582, 9th *American edition*, the decision in 3rd *Camp.* is referred to; and it is there said, that inland bills, although they bear date at a particular place, may be alleged to have been made anywhere in *England* or *Wales*. *Bailey on Bills*, 380, is cited by *Chitty* for this position. In bills drawn and payable in countries where the currency differs from our own, there is much reason for maintaining, that it was necessary to aver the place where the bill was drawn; accordingly, it has been decided, that where a bill was drawn in *Dublin* in *Ireland*, for *Irish* currency, and the declaration stated, that the bill was drawn at *Dublin*, to wit, at *Westminster*, &c., without alleging that *Dublin* was in *Ireland*, nor stating the bill to be for *Irish* currency, there was a variance, inasmuch as the bill must be taken to be drawn for *English* currency. 2 *Barr. and Ald.*,

Brookes vs. Chesley.—1846.

301. But *Mr. Chitty* intimates, that a different decision might be made since the act assimilating the currency between *Great Britain and Ireland*. 1 *Chit. Plead.*, 581.

In this conflict of authority, we feel ourselves justified in adopting as a rule, that authority which occurs to us as the most reasonable. In 13 *John.*, 450, although the court say, they might feel themselves bound by the cases, yet they intimate that their opinions were against the position, that such an allegation was a variance. The place where a note is dated is clearly immaterial; and if it be conceded, that in inland bills, no matter where dated, the allegation may be made, that such bill was made in any county where the suit is brought, it is difficult to perceive a reason, why in a foreign bill the same principle should not prevail, unless in consequence of the difference of currency between the currency of the country where the bill is drawn, and where it is sued upon, should render the true statement of the date necessary, to avoid a variance.

We are of opinion, there is no variance, and believe the court below were right in their decision on the sixth bill of exceptions.

The result of the above views is, that the decision of the court, in both appeals, should be affirmed.

JUDGMENT AFFIRMED.

JOHN BROOKES vs. ZADOCK C. CHESLEY.—*December* 1846.

Where the defendant said, within three years of action brought, in a conversation respecting the plaintiff's account, it had been presented to him before by the clerk of the plaintiff, and that he had stated to the clerk, he would settle the account if the plaintiff would take off the interest, the account being also proved, the defendant cannot insist that the evidence is not sufficient to take the claim out of the act of limitations.

APPEAL from *Prince George's* county court.

This was an action of *Assumpsit* brought on the 14th November 1843, by the appellant against the appellee. With

Brookes vs. Chesley.—1846.

the declaration the plaintiff filed an account of goods sold and delivered. Issues were joined on the pleas of *non assumpsit*, and limitations.

In the trial of this cause the plaintiff offered in evidence to the jury, the account declared on in the present action, and then proved to the jury by a competent witness, that shortly before the institution of the present suit, which was in March 1843, he, the witness, had a conversation with the defendant, respecting the claim of the plaintiff, in which he stated to the defendant, that the plaintiff had placed in his, the witness' hands, an account against him, the said defendant, for upwards of two hundred dollars, and desired him to settle it; that the defendant replied, that the plaintiff's account had been presented to him before by *Mr. White*, the clerk of the plaintiff, and that he had stated to him, the said *White*, that he would settle the account, if the plaintiff would take off the interest; and the said witness further stated, that the defendant told him, that he would settle the account now sued on, if the plaintiff would deduct the charges for interest contained in the account; he also stated, that he advised the plaintiff to deduct the interest from said account, but the plaintiff refused to do so.

Upon this proof, the defendant prayed the court to instruct the jury, that the evidence aforesaid, if believed by them, was not sufficient to take the case out of the operation of the statute of limitations; which opinion the court, (*MAGRUDER, C. J.*, and *C. DORSEY, A. J.*,) gave to the jury, and so instructed them. The plaintiff excepted.

2ND EXCEPTION. The plaintiff then, upon the foregoing evidence contained in the preceding bill of exceptions, which, by agreement, is made a part of this, prayed the court to instruct the jury, that the plaintiff was entitled to recover for all that portion of the account declared on, and given in evidence in the present suit, which had accrued within three years prior to the acknowledgment of the defendant, as given in evidence; provided the jury find from the evidence, that such acknowledgment of the said account by the defendant, was made. But the court were of opinion, and so instructed the jury, that upon the evidence, the plaintiff was not entitled to recover any

Brookes vs. Chesley.—1846.

part of said account; and no other testimony being offered, the court instructed them to find a verdict for the defendant; to which opinion of the court, the plaintiff excepted.

The plaintiff appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By T. F. BOWIE, for the appellant, and

By C. C. MAGRUDER for the appellee.

SPENCE, J., delivered the opinion of this court.

This is an action of *assumpsit*, instituted in *Prince George's* county court. The defendant pleaded *non assumpsit*, and the statute of limitations, (*actio non accrevit*,) to the counts in the nar.

The bill of exceptions states:—"In the trial of this cause the plaintiff to maintain the issues on his part joined, offered in evidence to the jury the account declared on in the present action; and then proved to the jury, by a competent witness, that shortly before the institution of the present suit, which was in March 1843, he, the witness, had a conversation with the defendant, respecting the claim of the plaintiff, in which he stated to the defendant, that the plaintiff had placed in his hands an account against him, the defendant, for upwards of two hundred dollars, and desired him to settle it; that the defendant replied, that the plaintiff's account had been presented to him before, by *Mr. White*, the clerk of the plaintiff, and that he had stated to him, the said *White*, that he would settle the account if the plaintiff would take off the interest. And the said witness further stated, that the defendant told him that he would settle the account, now sued on, if the plaintiff would deduct the charges for interest contained in the account."

"Upon this evidence the defendant, by his counsel, prayed the court to instruct the jury, that the evidence aforesaid, if believed by them, was not sufficient to take the case out of the operation of the statute of limitations; which opinion the court gave to the jury, and so instructed them. To which opinion

Brookes vs. Chesley.—1846.

of the court, and instruction to the jury, the plaintiff, by his counsel, excepted," &c.

This exception raises the vexed question, which has so long and so frequently embarrassed courts of law both in *England* and this country, namely, what declarations, admissions, or promises, will remove the bar raised by the statute of limitations?

We deem it unnecessary, in this case, to travel through the numerous cases, to be found in almost every volume of reports, for the purpose of ascertaining by analogies, whether the language used by the defendant, as given in evidence, does or does not remove the bar raised by the statute of limitations.

The words relied on by the plaintiff as sufficient to take the case out of the statute, are, "that he would settle the account if the plaintiff would take off the interest." And again, "that he would settle the account now sued on, if the plaintiff would deduct the charges for interest contained in the account."

An acknowledgment, to take a case out of the statute of limitations, must be of a present subsisting debt, unaccompanied by any qualification or declaration, which, if true, would exempt the defendant from any moral obligation to pay." *Oliver vs. Gray*, 1 H. & G., 216.

Does not the language used by the defendant, amount fully to an acknowledgment, that the account was a present subsisting debt? Was the condition or qualification, if true, such an one as exempted the defendant from a moral obligation to pay? We think not. But on the contrary, that it was equivalent to an admission of the sale and delivery of the articles charged in the account, (except the interest,) with a promise to pay.

In *Keplinger vs. Griffith*, 2 G. & J., 296, the defendant, when called on for payment of his note, said, "that he would not pay it; that *Chevalier* had charged him too much, and some discount must be taken from it; and that he must see *Mr. Chevalier* on the subject." This was held to be a clearly implied admission, "that the debt remained due and unpaid; and the excuse alleged for not paying it, furnished no real objection to paying it, if true."

 Ferrall vs. Kent.—1846.

So in this case, we think, the plaintiff was under no obligation to deduct, or discount, the items of interest from his account; nor did his refusal to do so, exempt the defendant from a moral obligation to pay the account.

The court, therefore, erred in their instruction to the jury, that the plaintiff was not entitled to recover.

It follows from the view which we have taken of the law, under the first exception, that the court erred in their second instruction to the jury, where they instructed them to find a verdict for the defendant.

JUDGMENT REVERSED, AND PROCEDENDO AWARDED.

DENNIS W. FERRALL, vs. ALICE L. KENT.—*December 1846.*

K rented a farm from *A*, upon the following terms:—he was to give to *A* one-half of every thing that was made. The tenant was to carry all the crops to market, and to pay *A* one-half of the proceeds, after sale. Under this contract, *K* made a crop of tobacco, and assigned in writing all his interest therein to *F*, who was to have the crop prepared for market and sold, and to pay over to *A* one-half of the net proceeds. The tobacco was left in the possession of *A*'s agent, and the tenant retained possession of no part thereof, after the execution of his agreement with *F*. **HELD:** that the contract between *K* and *A* created the relation of landlord and tenant; that it vested in each a joint interest in the crop, and that neither *K* nor his assignee, could maintain an action of replevin for it against *A*.

Where the judges of the county court are equally divided upon the admissibility of evidence, it is not suffered to go to the jury,

But if the proof has been received, and the division arises upon a motion to strike it out, then the motion is lost.

APPEAL from *Prince George's* county court.

This was an action of *replevin* for five thousand pounds of tobacco, brought on the 23rd December 1842, by the appellant against the appellee, who pleaded *non cepit*, and property in a stranger.

In the trial of this cause, the plaintiff to maintain the issues on his part joined, proved to the jury by the testimony of *Thomas H. Kent*, that in the year 1839 he rented of the

Ferrall vs. Kent.—1846.

defendant a farm in *Prince George's* county, for the years 1840 and 1841, on the following terms :—that he was to give the defendant, one-half of every thing that was made, he, the witness, to carry all the crops to market, and to pay her one-half of the proceeds after sale; that under this contract with the defendant, he worked the farm for the year 1841, and made, among other things, about twenty thousand pounds of tobacco.

The plaintiff further proved by the said witness, that in December 1841, he executed the following paper.

“Know ye, that I, *Thomas H. Kent*, of, &c., being about to leave the State aforesaid, for the State of *Arkansas*, and being indebted to *Dennis W. Ferrall*, and the estate of *Thomas Ferrall*, jointly, in the just and full sum of \$307.73, and being desirous of securing the payment of the same, do hereby for that purpose, bargain, sell, and make over, unto the said *Dennis W. Ferrall*, his heirs and assigns, all my part, interest and claim, in and to the crop of tobacco made by me in the year 1841, on the plantation of *Mrs. Alice L. Kent*, he, the said *Ferrall*, to have the said crop prepared for market, and sold to the best advantage; and after deducting all necessary expenses attendant upon the same, shall pay over to the said *Mrs. A. L. Kent*, one-half of the net proceeds of the whole crop, made as aforesaid; the other half the said *Dennis W. Ferrall* is to apply to the debts hereinbefore mentioned; and if any balance should remain in his hands after such application, he shall pay the same over to *Mrs. A. L. Kent*, and take her receipt for the amount. In witness whereof, I have hereunto set my hand and seal, this 24th December 1841.

THOS. H. KENT. (Seal.)”

Which included the crop of tobacco made on said farm, for 1841, to recover a part of which, the present action is brought; and also proved by said witness, that the said tobacco was left by him in the possession of the defendant's agent, and that he retained possession of no part thereof, after the execution of said paper.

The defendant prayed the court, to exclude from the jury the said bill of sale, as inadmissible evidence to prove title in the plaintiff to the tobacco contained in the said bill of sale;

Ferrall vs. Kent.—1846.

and the court being divided in opinion, it was insisted on by the plaintiff, that the said paper must be read to the jury, unless excluded by the judgment of the court, on the defendant's prayer; but the court, after being thus divided, were of opinion, by reason of said division of opinion, that said paper could not go to the jury, and refused to permit the same to be read. To which opinion of the court, (MAGRUDER, C. J., and C. DORSEY, A. J.,) the plaintiff excepted.

The plaintiff appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By T. F. BOWIE, for the appellant, and

By C. C. MAGRUDER, for the appellee.

MARTIN, J., delivered the opinion of this court.

This was an action of *replevin*, instituted in *Prince George's* county court, to recover from the defendant five thousand pounds of tobacco. To the declaration the defendant pleaded *non cepit*, property in the defendant, and property in a stranger, on which pleas issues were joined.

At the trial of the cause, the plaintiff below proved, by *Thomas H. Kent*, that in the year 1839, he rented of the defendant her farm, for the years 1840 and 1841, on the following terms:—He was to give the defendant one-half of every thing that was made; he was to carry all the crops to market, and to pay her one-half of the proceeds after they were sold; that under this contract he worked the farm for the year 1841, and made, among other things, about twenty thousand pounds of tobacco.

The plaintiff further proved by the witness, that in December 1841, he executed the paper, set out in the bill of exceptions, of the 24th of December 1841; that it included the crop of tobacco made by the defendant in 1841, to recover a part of which the present action is brought, and that it was left by him in the possession of the defendant's agent, and he retained possession of no part of it after the execution of the instrument of writing referred to.

In this condition of the case, the defendant prayed the court to exclude from the jury the said bill of sale, as inadmissible evidence to prove title in the plaintiff to the tobacco in question; and the court being divided in opinion, it was insisted by the plaintiff, that the paper must be read to the jury. The court, however, determined, that by reason of a division of opinion, the paper could not go to the jury, and refused to permit the same to be read. From this opinion the appellant appealed, and it forms the subject of the only exception taken in the cause.

It is apparent from the record, that the paper thus offered in evidence, was not read to the jury. Objection was taken to its admissibility, by the counsel for the defendant, in the form of a prayer, as soon as it was offered, and upon this question the court was divided in opinion.

That this is a correct view of the case, is placed beyond controversy by the language of the court. They say distinctly, that the paper could not go to the jury, and declare, that it was not to be read. In this state of the question, the court below decided correctly, that by a division of opinion, the evidence was lost. The rule is, that when testimony is objected to, it cannot be admitted, unless sustained by the judgment of the court.

If the paper had been read to the jury, without objection, and upon a prayer by the defendant to strike it out of the cause, the court had been divided in opinion, the aspect of the question would have been changed, and the evidence could not have been excluded.

As we think the court below committed no error in the opinion expressed by them, it becomes necessary to consider the question, whether the evidence itself was admissible, to prove title in the appellant to the tobacco in question?

This question is free from difficulty. It is plain, we think, that the contract between *Thomas H. Kent* and *Alice Kent*, created the relation of landlady and tenant, and vested in each of them a joint interest in the crops. This being so, assuming that the bill of sale transferred to *Dennis W. Ferrall* the part of *Thomas H. Kent*, in the crop of tobacco made by him in

Crawford vs. Brooke.—1846.

1841, it would have constituted a tenancy in common between *Ferrall*, as the grantee of *Thomas H. Kent*, and *Mrs. Kent*; and under such circumstances an action of replevin could not be maintained. 1 *H. & G.*, 322.

Upon this ground also, we think the evidence offered by the plaintiff below was inadmissible, and that the judgment of the county court must be affirmed.

JUDGMENT AFFIRMED.

THOMAS B. CRAWFORD AND DAVID CRAWFORD, ADMR'S
OF DAVID CRAWFORD, vs. JOHN B. BROOKE, TRUS-
TEE.—*December 1846.*

H, in consideration of love and affection for his children, assigned to *J*, an account for medical services rendered, and medicines furnished to *C*, in trust, "that the proceeds of the said account when collected, after deducting the expenses thereof, shall be immediately applied to the exclusive benefit and advantage of his children, by *J*, the trustee." In an action by *J* against *C*, to recover the amount of the account, *H*, the assignor, is a competent witness to prove the rendition of the services by himself, and a promise to pay the same within three years before the institution of the suit. When objection is made to the competency of a witness, upon the ground of interest, the inquiry is, whether he is interested at the moment his testimony is tendered to the court?—if he then has no interest, he is competent. A legal, certain, and immediate interest, in the event of the suit itself, or in the record as an instrument of evidence, in support of his own claims in a subsequent action, is necessary to render a witness incompetent. When the plaintiff claims under an assignment, in virtue of the act of 1829, ch. 51, the defendant may prove, that it was not made *bona fide*. So when the assignor was examined as a witness, to sustain the right of action of his assignee under that act, the defendant may ask the witness, whether his account had, or had not, been assigned, because of its being barred by limitations, and for the purpose of making himself a witness to prove the rendition of the services charged therein, and the promise of the defendant to pay the same. The defendant may impeach an assignment made for such purposes, on the ground of fraud. When the plaintiff claimed as trustee, in virtue of a purely voluntary assignment, and as assignee, under the act of 1829, ch. 51, and the assignor was offered as a witness to sustain the claim, the defendant may examine into the motives for making the assignment.

Crawford vs. Brooke.—1846.

When such an assignment was made, to enable the assignor to become a witness, and thus remove the bar of limitations, it cannot be regarded as *bona fide* made, within the act of 1829.

An account for medical services and the sale of medicine, is a *chose in action* for the payment of money.

By the act of 1829, ch. 51, no discrimination is made between express and implied contracts. Both are within the act, when the contract assigned is for the payment of money only.

In declaring under such an assignment, the plaintiff need neither aver a promise by the defendant to pay him the account, nor that he was *bona fide* entitled to the account, nor that it was *bona fide* assigned to him.

APPEAL from *Prince George's* county court.

This was an action of *assumpsit*, commenced on the 13th March 1843, by the appellee against the appellants. The claim was for medical services and medicines, rendered to *David Crawford* by *Hodges* and *Brooke*, from 1834 to 1839, amounting to \$619.69. The appellants pleaded *non assumpsit*, and limitations.

The plaintiff claimed, in his declaration, as the assignee of *Hodges* and *Brooke*, under the act of 1829, ch. 51. The assignment to the account, relied upon in the pleadings and evidence, was as follows:—

“In consideration of the natural love and affection which we bear to our several and respective children, we, and each of us, do hereby grant, bargain, transfer, assign and set over, all our respective right, title, interest and claim, of, in and to, the within account, to *John B. Brooke*, upon the following trust, to wit, that the proceeds of said account, when collected, after deducting the expenses thereof, shall be immediately applied, according to our respective interests therein, to the exclusive benefit and advantage of our several children, by the said *John B. Brooke*, trustee as aforesaid, as witness our hands this first day of March, 1843.

B. B. HODGES,
HENRY BROOKE.”

“Witness,—DANIEL C. DIGGES.”

There was a verdict for the plaintiff and a motion in arrest of the judgment.

1st. Because it is not averred in either of the counts in the declaration, that the plaintiff was *bona fide* entitled to the account mentioned in the same, by virtue of the assignment.

2nd. Because it does not appear, by the said pleadings, that said account was *bona fide* assigned.

The county court overruled the motion, and entered judgment for the plaintiff.

1ST EXCEPTION. At the trial of this cause the plaintiff, to maintain the issues joined on his part, offered in evidence to the jury the aforesaid account, and the assignment thereon, which is admitted to have been signed and delivered to the plaintiff, by *B. B. Hodges* and *Henry Brooke*. And offered to prove, by *Henry Brooke*, a member of the firm of *Hodges & Brooke*, and one of the said assignors, that the services charged in the said account, were rendered by the said firm to the said *David Crawford*, deceased, at his instance and request; and that in June, 1841, the witness called on the said *David Crawford*, in his lifetime, and presented the said account for payment, when the said deceased acknowledged the same to be correct, and promised to pay it.

The defendants objected to the admissibility of this proof, on the ground, that the said witness was one of the original creditors in said account, and incompetent to prove the said acknowledgment and promise, and the rendition of said services.

But the court, (MAGRUDER, C. J., and KEY, A. J.,) were of opinion that said testimony was admissible, and overruled the objection, and permitted the same to go to the jury; the defendants excepted.

2ND EXCEPTION. After the preceding testimony had gone to the jury, which by agreement is made a part of this, the defendants asked the said *Henry Brooke*, who was under cross-examination, whether the said assignment on said account was or was not made, because the said account was barred by limitations; and for the purpose of making himself a witness to prove the rendition of said services, and the said acknowledgment and promise by the said *David Crawford*, deceased? The defendants' counsel stated, that they asked this question for the purpose of shewing, that the said account had not been *bona fide* assigned, as required by the act of Assembly, in such case made and provided. But the plaintiff's counsel objected

Crawford vs. Brooke.—1846.

to this question being propounded to the witness, because, it appearing upon the face of the assignment that the same was made upon a good consideration and *bona fide*, it was not competent for the defendants, in this mode, and by this witness, to prove the fact which they proposed to prove by the question so propounded.

The court sustained the objection to the right of the defendants to propound the said question; the defendants, by their counsel, excepted.

3RD EXCEPTION. The defendants then prayed the court to instruct the jury, that upon the testimony contained in the first exception, and which by agreement is made a part of this, if the same be believed by the jury, the plaintiff is not entitled to recover :

1st. Because the said account is not such a *chose in action*, for the payment of money, as is assignable under the act of Assembly, to enable the assignee to sue in his own name.

2nd. Because there is no proof in the cause, that the defendants, as administrators of the said *David Crawford*, made to the plaintiff any acknowledgment or promise, to pay him the said claim after the said assignment was made.

But the court overruled the defendants' prayer, and refused to instruct the jury as prayed; the defendants excepted.

The defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, and MARTIN, J.

By TUCK and BOWIE, for the appellant, and
By J. JOHNSON and D. C. DIGGES, for the appellees.

MARTIN, J., delivered the opinion of this court :

This was an action of *assumpsit*, instituted by the appellee as the assignee of an account due to *Messrs. Hodges and Brooke*, for medical services rendered, and medicines furnished to *David Crawford*, the intestate. The appellant pleaded *non assumpsit*, and limitations, and upon those pleas issues were joined.

The assignment was as follows :—

“ In consideration of the natural love and affection we bear our several and respective children, we and each of us, do hereby grant, bargain, transfer, assign and set over, all our respective right, title, interest and claim, of, in, and to, the within account, to *John B. Brooke*, upon the following trust, to wit, that the proceeds of said account, when collected, after deducting the expenses thereof, shall be immediately applied, according to our respective interests therein; to the exclusive benefit and advantage of our several children, by the said *John B. Brooke*, trustee, as aforesaid.”

At the trial of the cause, the plaintiff below offered *Henry Brooke*, one of the assignors, as a witness, to prove the rendition of the services charged in the account, and an acknowledgment of, and promise to pay, the same, by the intestate, within three years before the institution of the suit.

The defendant objected to the competency of this witness, but the court overruled the objection; and the correctness of the opinion of the court on this question, forms the subject of the first exception.

The fact, that the witness offered by the plaintiff was one of the assignors, constituted in itself no objection to his competency, if he had parted with his whole interest in the claim, and could neither gain, nor lose, by the event of the suit. When objection is made to the competency of a witness, upon the ground of interest, the inquiry is not, whether he was originally interested; but, is he interested at the moment his testimony is tendered to the court? And if it appears at the time he is presented to the court, he has no interest in the result of the controversy, the circumstance that he was once the owner of the cause of action, and has assigned it, interposes no obstacle to his examination. This is clear upon principle, and has been directly decided. 9 *Wend.*, 295. 3 *Bin.*, 313. 1 *Raw.* 434.

In the case of *Stimmel against Underwood*, 3 *G. & J.*, 287, the Court of Appeals have defined the kind of interest which will exclude a witness from testifying in a cause. They determine, that it must be a legal interest, and that a mere honorary obligation will not render him incompetent. This

Crawford vs. Brooke.—1846.

rule upon the subject of interest, remained unsettled until the decision of the court of King's Bench, in *Belt against Baker*, 3 Term., 27; but it is now established, that the only cases, in which, for this cause, a witness is incompetent, are, where he has a legal, certain, and immediate, interest in the event of the suit itself; or in the record, as an instrument of evidence, in support of his own claims in a subsequent action. *Doe vs. Tyler*, 6 Bing., 390. 1 Greenl. Ev., 432. Applying this test to the competency of the witness, we can discover no reason for excluding him.

It is certainly true, that where the situation of the witness is such, that he would become responsible to the party by whom he is required to give testimony, for the expenses which might be incurred in the prosecution of a claim, in case of defeat, he is incompetent; for he has a direct interest in sustaining the cause of the party by whom he is called. 3 C. & Pail., 571. And if the counsel for the appellants could have maintained their proposition, that the assignor was responsible to the plaintiff below, for the expenses to which he might be subjected in a contest for this debt, they would have shown a case in which the witness was to be excluded. But such is not the predicament of the witness. The assignment provides, that the expenses are to be paid out of the fund, when collected; and on the contingency of the plaintiff failing in the action, and being, therefore, obliged to pay the costs of the suit, there could be deduced from this assignment, voluntary as it is in its character, no legal obligation express or implied, to indemnify the plaintiff for the expenses thus incurred by him. The fact, that the witness might consider the circumstances under which the assignment was made, as imposing upon his honor an obligation to protect his trustee from loss, is an objection which would go only to his credibility. We think, therefore, that the court below decided correctly, in permitting the witness to be examined.

The decision, however, of the court below, in the second exception, presents a very different question.

It is stated, that after the witness had been examined in chief, the defendant, for the purpose of showing that the

Crawford vs. Brooke.—1846.

account had not been *bona fide* assigned, as required by the act of Assembly, proposed to ask the witness: "whether the assignment of the account had or had not been made, because of its being barred by limitations; and for the purpose of making himself a witness to prove the rendition of the services charged therein; and the promise of the defendant's intestate to pay the same." The counsel for the plaintiff objected to this question being propounded to the witness, and the objection having been sustained by the court, the correctness of their opinion, in this respect, becomes also the subject of examination.

It is clear, that it was competent for the defendant, on the pleadings in the cause, to prove that the account in question had not been *bona fide* assigned, as required by the act of Assembly of 1829, ch. 51. The suit was brought in the name of the assignee, under the provisions of that statute, which enables the *bona fide* assignee of a chose in action, for the payment of money, to maintain an action in his own name. The objection, that the plaintiff was not a *bona fide* assignee of this account, and was not therefore embraced by the provisions of the act of Assembly, went directly to his right to recover, and was admissible upon the plea of *non assumpsit*. The assignment was necessarily exhibited by the plaintiff, as constituting his title to sue, and was liable to be attacked by his adversary, on the ground of the fraudulent character of the transaction.

It has, however, been contended by the counsel for the appellee, that the evidence proposed to be offered, was inadmissible, because the effect of it was to contradict, or explain the terms of the written assignment. And in support of the proposition, the cases of *Bend against The Susquehanna Bridge Company*, 6 H. & J., 128; *Watkins vs. Stockett*, 6 H. & J., 444; and *Westly vs. Thomas*, 6 H. & J., 24; have been referred to. Those cases recognise the familiar principle, that it is not in the power of a party, except on the ground of a fraud or mistake, to contradict by parol evidence the instrument which he has signed, or to interpolate into it, new terms and stipulations.

Crawford vs. Brooke.—1846.

But a clear view of the object for which this testimony was offered, will show, that its admissibility was unaffected by the decisions to which we have been referred; and, that it is not obnoxious to any just exception. It was not proposed for the purpose of contradicting the assignment, or of ingrafting upon it any new or additional consideration. The defendant admitted that the assignment was purely voluntary, and that the proceeds of the account, when collected, were to be applied by the trustee, for the exclusive benefit of the *cestui que trusts*. The question propounded to the witness, was to discover the motive by which he was governed in making the transfer, and to prove that it was for the purpose of enabling the assignor to become a witness, and thus remove the bar raised by the statute of limitations. An assignment made under such circumstances, cannot be regarded as, *bona fide*, within the meaning of the act of Assembly. And when it is considered, that the testimony was offered, not by a party to the instrument, but by a stranger, and one who was injuriously affected by the assignment, and upon the ground that it was founded in fraud, we can perceive no reason for rejecting it.

The rule indeed, which has been relied on, as forbidding the introduction of parol evidence to contradict or vary the terms of the written assignment, has no application to this case. It is confined to the parties to the instrument, and their representatives, or those claiming under them; and does not extend to a third person, in the situation of the defendant. 1 *Wheat. R.*, 314. 1 *Greenl. Ev.*, 317.

It is true, as stated by the counsel for the appellee, that the court will not permit the assignor to defeat, or disparage, the title of his assignee, by acts or admissions, subsequent to the assignment. The assignee, even in cases where he is obliged to sue in the name of the assignor, is regarded as the real plaintiff. He is protected against "such acts and admissions of the assignor, as would operate in fraud of his rights." Therefore, if the defendant should procure a release from the assignor, or obtain a sett-off against him, after notice of the assignment, or possess himself of any other defence, through his instrumentality, it would be inoperative; and the court

Crawford vs. Brooke.—1846.

would preclude the defendant from availing himself of such defence, "whether asserted in the form of a plea, or as evidence under the general issue." *Owings and Piet vs. Low*, 5 G. & J., 145. *Frear vs. Evertson*, 2 J., 142. 5 *Wheat.*, 277.

But this doctrine has no application to the question under consideration. The evidence was not offered to impeach the assignment, or to impair the rights of the assignee, by any thing that occurred subsequent to the transfer. It was proposed, as we have seen, to prove, that at the time the assignment was made, the assignor was influenced by considerations, which would invalidate the instrument itself, upon the true construction of the act of Assembly.

We are therefore of opinion, that the question proposed by the defendant was proper, and that the court erred in not permitting it to be propounded to the witness.

By the act of Assembly of 1829, ch. 51, to which we have already adverted, it is provided, "that any assignee *bona fide* entitled to any judgment, bond, speciality, or other chose in action, for the payment of money, assigned in writing, may, by virtue of such assignment, maintain an action in his own name;" and the question presented for our consideration by the third exception, is, whether an open account of this description, is assignable, so as to authorise the assignee to sue in his own name, according to the true interpretation of that act?

It must be conceded, that an account for the rendition of medical services, and for the sale of medicine, is a chose in action for the payment of money; for, on proof that the services were rendered, and the medicine furnished, as charged, the law raises a promise to pay for them in money. As, therefore, an account of this kind is obviously within the words, it must be regarded as within the contemplation of the act, unless the legislature intended to discriminate between express and implied contracts. But no such distinction is to be found in the statute. The language is sufficiently comprehensive to embrace all choses in action, with the single qualification, that they must be for the payment of money; and the difference between an express and implied contract, is not in the cha-

Crawford vs. Brooke.—1846.

racter of the undertaking, but only in the mode of proof. 2 *Greenl. Ev.* 78.

We think, therefore, that this account is embraced by the act of Assembly. Prior to that act, the assignee of a chose in action, unless it was negotiable by the mercantile law, was obliged to sue in the name of the assignor, or if he was dead, in that of his personal representative. To obviate this inconvenience, often injurious to the assignee, the act of Assembly was passed; and is to be liberally construed, as a remedial and beneficial statute.

The elementary writers upon the subjects of contracts, divide them into two classes: those, in which the parties stipulate to perform, or to omit to do, some act or duty, and those which are for the payment of money. The former class of contracts is clearly not within the provisions of this act of Assembly; for, though the law gives to the party a remedy in the form of damages for the injury he sustains by a violation of the contract, it is not a chose in action for the payment of money.

In the case of *Gordon against Downey*, 1 *G. R.*, 41, the chose in action was a written agreement, by which the defendant stipulated for the payment of a rent, in money, to the lessor of the demised premises, and also to give to a third person mentioned in the instrument, a portion of the produce raised upon the land, and to furnish the means of removing it.

It is apparent, therefore, from an inspection of the agreement, that it was not a chose in action, purely for the payment of money, but contained other stipulations; and upon this ground, the court held that it was not such a chose in action as was contemplated by the act of Assembly. They say:—"It was not the intention of the legislature to confer on the assignee any such power, except in cases where the chose in action was purely for the payment of money; and where the only action which, from the nature and stipulations of the chose in action assigned, the assignor could have maintained, if no assignment had been made, was that for the payment of money due on the contract." This is the character of the chose in action before us. It is evident, that the only action which the assignee could have maintained on this account, if no assignment had

Buckingham vs. Clary.—1846.

been made, was an action for the payment of money, due on the implied contract.

It follows from the views thus expressed, that we think, the court below committed no error by rejecting the defendant's prayer, as presented in this exception. The plaintiff was entitled to maintain the action in his own name, by virtue of the assignment, and it was unnecessary either to aver in the declaration, or prove, a promise by the defendants to pay the account.

We think the court below decided correctly in overruling the motion made by the defendant to arrest the judgment. That it was not necessary for the plaintiff to aver in his declaration, that he was *bona fide* entitled to the account, or that it was *bona fide* assigned, is determined in the case of *The Bank of the United States vs. Lyles*, 10 G. & J., 326. The objection would have been bad on *demurrer*.

We concur therefore with the county court, in the opinion expressed by them in the *first* and *third* exceptions, and in overruling the motion in arrest of judgment. But as we dissent from the opinion expressed by the court in the *second* exception, we shall reverse the judgment, with costs to the appellant, and order a *procedendo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

BEALE BUCKINGHAM vs. BENEDICT AND NICHOLAS G.
CLARY.—*December* 1846.

The principal obligor in a bond is a competent witness to prove its execution by his surety therein, in an action on such bond, under the plea of *non est factum* by the surety. The witness is liable either to the plaintiff, or to the defendant, if he pays it, for the whole amount of the bond, and was therefore called to testify against his own interest in either event.

APPEAL from *Carroll* county court.

This was an action of *debt*, commenced on the 22nd March 1844, by the appellees against the appellant. The plaintiffs declared upon the bond of the appellant, dated 20th February

Buckingham vs. Clary.—1846.

1841, payable to him twelve months after date, for \$200. The defendant pleaded *non est factum*, on which plea issue was joined.

In this case, the plaintiff to prove on his part the issue joined, offered in evidence the single bill declared on, and to prove the signature of *Beale Buckingham*, the defendant, and that the said *Beale Buckingham*, was the security of *Larkin Buckingham*, one of the obligors; and that the witness, hereinafter mentioned, was present, and saw said defendant execute the single bill offered *Larkin Buckingham*, the co-obligor, as a witness.

The defendant, objected to the witness as incompetent, on the ground, that he was interested, because the effect of his testimony was to lessen the amount of his own indebtedness on the instrument; and to make the defendant liable for the debt, equally with, and partly in exoneration of, himself, the witness. And because he, the plaintiff, was, if the single bill be genuine, a co-obligor with the defendant: and if the name of *Beale Buckingham* was a forgery, then the witness was a sole obligor in the instrument, it being admitted, that the witness, himself, did execute the instrument according to its purport. The court, (DORSEY, C. J., and WILKINSON, A. J.,) overruled the objection, and permitted the witness to testify, being of opinion, that he was competent. The defendant excepted.

The defendant appealed to this court.

The cause was argued before ARCHER, C. J., MAGRUDER and MARTIN, J.

By RAYMOND for the appellant, and
By PALMER for the appellee.

ARCHER, C. J., delivered the opinion of this court.

This was a suit instituted to recover the amount of a single bill obligatory. The plaintiff offered the principal obligor in the bill, to prove the execution of the bill by his surety. The witness was objected to, as incompetent from interest.

Craig and Angle vs. Ankeney.—1846.

The evidence proposed to be offered by the witness, was against his interest: for if the plaintiff, for whom he was called to testify, recovered, the witness would be liable over to his surety for the costs of this suit. But if this were not so, he would have no interest in the event of the suit: for as principal obligor, he would be liable to the plaintiff for the debt; or if the defendant paid it, would be liable over to him, as his surety therefor.

JUDGMENT AFFIRMED.

WILLIAM CRAIG AND JACOB ANGLE, JR., vs. HENRY ANKENEY.—*December 1846.*

Where a cause is set down for final hearing upon bill and answer, the averments of the bill are qualified by those in the answer.

Where two parties are equally bound by separate instruments, under seal, as securities, for the payment of the same debt, and a payment by one redounds to the discharge of the other, the one, making the payment, may recover by way of contribution, either at law, or in equity.

Parties equally bound as sureties by different instruments for the same debt, may still be liable to each other for contribution. The doctrine of contribution is not founded on contract, but upon an implied equity resting upon natural justice, and sound morality.

Where parties are so bound, it would be against equity to permit one to recover from the other, more than a moiety of the amount paid by him, in satisfaction of a debt, for the payment of which both are equally responsible.

A court of chancery never will, against equity and conscience, interpose by way of injunction, to arrest the progress of proceedings at law, unless required to do so upon principles of public policy.

One security cannot, by injunction, arrest the proceedings at law of his co-security against him, for contribution, unless he tenders the principal and interest due such co-security, who had paid the principal debtor; or allege, that he was ready and willing to bring the same into court to be paid to him, as a condition of the court's interference.

APPEAL from the Equity side of *Washington* county court.

On the 25th of March, 1844, *Henry Ankeney*, filed his bill against *William Craig* and *Jacob Angle, Jr.*, alleging, that about the 25th January 1842, *Jacob H. Barnett* called on him, saying, he was indebted to a certain *William Craig*,

Craig and Angle vs. Ankeney.—1846.

in the sum of \$263, and desired your orator to become his surety in a single bill, to said *Craig*, for that amount; that he did become surety for said *B.*, on said note, payable to *C.* That when said note was taken by said *Barnett* to said *Craig*, he, the said *Craig*, refused to accept the same, saying, the debt due to him by said *Barnett*, was well secured by a certain *Jacob Angle, Jr.*, who was security to him for said *Barnett*. That soon thereafter, the said *Barnett* become heavily embarrassed, and the said *Angle* becoming uneasy on account of his liability for him, and the said note not being destroyed, as it should have been when *Craig* refused to take the same, applied to the said *Craig*, requesting him to assign said note to him, which the said *Craig* at first was unwilling to do, he having no interest in the same, but at length, by the importunity of the said *Angle*, the said *Craig* did assign the same to him; the said *Angle*, after the refusal of the said *Craig* to accept the same, obtained and retained possession of said note, having so obtained possession of said note and assignment, has caused suit to be instituted on said note in the name of the said *Craig*, the legal plaintiff, for his use, which said suit is now pending in *Washington* county court, and stands for trial at the March term ensuing. And your orator exhibits a copy of said note, which he prays may be taken as part of his bill, viz:—

“\$263.—Twelve months after date, we, or either of us, promise to pay *William Craig*, or order, the sum of \$263, for value received, this 25th day of January 1842, with interest from date.

J. H. BARNETT, (Seal.)

HENRY ANKENEY, (Seal.)”

On the back of the same is the following endorsement:—

“November 9th, 1843. I hereby sign my right and title of the within note to *Mr. Jacob Angle, Jr.*

WM. CRAIG.”

Prayer for subpœna and injunction, forbidding the prosecution of the action at law.

On the 26th March 1844, BUCHANAN, A. J., ordered, that an injunction issue, in pursuance of the prayer of the within bill.

Craig and Angle vs. Ankeney.—1846.

The answer of *W. Craig* is omitted, as not material.

The answer of *Jacob Angle, Jr.*, set forth, that it is true, as stated in said bill, that a certain *J. H. B.*, was indebted to a certain *W. C.*, about the 25th January 1843, in the sum of, &c., that in or about the month of October 1840, the said *Jacob H. Barnett*, and a certain *Daniel M. Bowles*, were partners; that in or about the month of October 1840, the said *Bowles*, as one of the said partners aforesaid, purchased from the said *Craig* a quantity of corn, amounting to the sum of \$250.57; that after said corn had been purchased, an arrangement was made between the said *B.* and *B.*, by which the said *Barnett* was to take upon himself the payment of the said debt of said firm, to said *Craig*; that the said *Barnett* called upon this defendant, and requested him to become his security to said *Craig*, for the amount of money owing to him for said corn, and the said *Barnett* agreed and promised, to and with this defendant, that if he, this defendant, would become his security, as aforesaid, for said sum of money, to said *Craig*, that he, the said *Barnett*, would give to this defendant a note or obligation, to be signed by himself, the said *H. A.*, and a certain *Henry Firey*, as his securities, by which this defendant should be fully indemnified and saved harmless, for any risk or liability which he would incur, as said *Barnett's* surety to said *Craig*, for the money owing him. That upon and in consideration of this promise and undertaking of the said *Barnett*, to furnish this defendant with the indemnity aforesaid, this defendant did agree to become, and did become, the security of the said *Barnett* to the said *Craig*, for the debt owing to him for said corn; and the said *Craig*, upon this defendant becoming the security of the said *Barnett*, as aforesaid, agreed to give a reasonable time for the payment of said debt. And this defendant further saith, that the said *Barnett* not having paid said *C.* for the corn, he was called on by said *C.* several times, in the fall of 1841; that in the fall of 1841, this defendant promised the said *C.*, that if said *Barnett* did not pay him the money owing for said corn, before the 1st January 1842, that he, this defendant, would give to said *C.* his own note, as said *Barnett's* security, for

Craig and Angle vs. Ankeney.—1846.

the amount of said debt. That said *Barnett* not having paid said *Craig*, by the 1st January 1842, this defendant did, in the early part of January 1842, give to the said *Craig* as security of said *Barnett*, his own note for the amount of said debt; no note or obligation having been before given to said *Craig* for said debt, either by this defendant or said *Barnett*. And this defendant further saith, that said *Craig* did not agree to receive the note of this defendant, as an absolute payment of said *Barnett's* debt; nor did he agree to release said *Barnett* from said debt, in consideration of receiving this defendant's note, as aforesaid; but it was the understanding of this defendant, as well as the said *Craig*, that said *Barnett* was still liable for said debt. And this defendant further answering saith, that he had before called on said *Barnett*, either to pay said *Craig* for the corn purchased, as aforesaid, or to give to this defendant the obligation of said *Barnett*, with said *Ankeney* and *Firey*, as security, according to the original agreement above mentioned, made when this defendant agreed to become the said *Barnett's* security, as aforesaid. That having pressed the said *B.* for the indemnity aforesaid, the said *B.* brought to this defendant, about the last of January 1842, the note executed by himself and the said *Henry Ankeney*, for the payment of \$263, the amount of principal and interest then supposed to be due for said corn, in favor of said *Craig*, dated 25th January 1842; a true copy of which is exhibited by the complainant with his bill of complaint. That when this defendant saw this note was made payable to said *Craig*, he objected to receiving of it; but the said *Barnett* proposed, to save himself the trouble of getting a new note, that this defendant should take it to said *Craig*, and get him to assign it to this defendant, and this defendant finally agreed with the said *Barnett*, to take said note with said *Ankeney* as security as aforesaid, as his indemnity, and that he would get it assigned to him by said *Craig*, as first suggested by said *Barnett*. This defendant and the said *Barnett*, both supposing that said *C.* would have no objection to make such assignment, as the said *C.* then held the note of this defendant for the amount of said *Barnett's* debt, which he had received several weeks before the note of

Craig and Angle vs. Ankeney.—1846.

the said *Barnett* and *Ankeney*, was executed to the said *Craig*: that said note was then left in the possession of this defendant. And this defendant expressly denies the allegation in said bill of complaint, to wit, that when said note was taken to said *Craig*, he, the said *Craig*, refused to accept the same, saying, the debt due to him by said *Barnett*, was well secured by a certain *Jacob Angle, Jr.*, who was security to him for said *Barnett*. This defendant denies that the said *B.* ever did take said note to said *C.*, or that *C.* did refuse, as aforesaid, to accept the same. On the contrary thereof this defendant alleges, that if said *B.* had taken said note to said *C.*, he has no doubt that said *C.* would have accepted it, although the said *C.* might have considered the security given to him by this defendant was an ample security. And this defendant further saith, that after said *B.* had delivered the said note to him, with the understanding and agreement, that this defendant should get the said *C.* to assign it to him, this defendant retained possession. And in the month of August 1843, this defendant called on the said *Ankeney*, and requested him to make payment of the money due and owing on said note; that he then informed said *Ankeney*, that he held and owned said note, and that the money due and owing on said note was coming to this defendant. That this said defendant pressed the said *Ankeney* for the payment of said note; that the said *Ankeney*, so far from making any objection to the payment of said note, promised that he would attend to it, and expressed his thanks to this defendant for notifying him that said note had not been paid; and further stated to this defendant, that he knew said *B.* had plenty of property by which he could secure himself.

And this defendant denies that said *C.* ever refused to assign said note to him, as alleged in said bill of complaint, or that this defendant ever used any importunities with the said *C.* to obtain from him such assignment; on the contrary thereof this defendant alleges, that said *C.* did not hesitate to make such assignment, as soon as he was informed of the circumstances under which the said note had been left, by said *Barnett*, in the possession of this defendant; and this defendant further

Craig and Angle vs. Ankeney.—1846.

states, that he sent said note to said *Craig* on or about the 9th of November 1843, with a request, that said *C.* would put a written assignment thereon, which he did without hesitation, on the day and year last aforesaid, and then sent said note back to this defendant. That said *Barnett* and *Ankeney* having failed to pay said note, this defendant had a suit brought upon it in *Washington* county court, where it is now pending, as alleged in said bill of complaint. And this defendant saith, that he hath fully paid and satisfied the said *Craig* the amount of the note which he gave to said *Craig*, as the security of said *Barnett*. And this defendant further saith, that at the time the said *Barnett* delivered to him the said note for \$263, with the said *Ankeney*, as security thereon, the said *Barnett* was perfectly able to pay said *Craig* for said corn, or to have given this defendant ample security; but when this defendant received said note, with said *Ankeney* as security, he considered himself safe, and did not ask of said *Barnett* any other security. The said *Ankeney*, by executing said note and delivering it to said *Barnett*, prevented this defendant from taking other measures to indemnify himself in any other way for his securityship for said *Barnett*.

The cause having been set down for a hearing on bill and answer, it was decreed by (BUCHANAN and MARSHALL, A. J.,) that the injunction heretofore issued in this case, be, and the same is hereby made perpetual, and that complainant be allowed his costs, to be taxed by the clerk of this court.

The defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, MAGRUDER and MARTIN, J.

By JERVIS SPENCER for the appellants, and

By RANDALL for the appellee.

DORSEY, J., delivered the opinion of this court.

According to the facts, as we are bound to assume them to be, in the decision of this case, which has been set down for final hearing on bill and answer; the averments in the bill, qualified as they are by the answers of the appellant, *Angle*,

Craig and Angle vs. Ankeney.—1846.

are so defective, and insufficient, that the right of the appellant to the aid of a court of equity, may well be regarded as a matter of great doubt, even under the curing provisions of the acts of Assembly, which prevent this court from reversing any decree, or dismissing any appeal on the ground of a want of jurisdiction, or the insufficiency of the averments in the bill; unless such objections to the proceedings were raised in the court below.

The answer of *Angle* disproves the allegation in the bill, that the single bill, to prevent the recovery of which the injunction in this case was granted, was rejected by *Craig*, as a security for his debt. But that answer fails to establish the fact, that *Ankeney*, in signing this bill, intended it as an indemnity or counter security to *Angle*, for his liability to *Craig*; or that, as far as *Ankeney* was concerned, it was intended for any other purpose, than as a security to *Craig*, for the debt due to him by *Barnett*. *Angle*, and *Ankeney*, must, then, each be regarded as security to *Craig*, for the same debt, being equally bound, by separate instruments, for the payment of the whole debt. A payment thereof, by one of them, redounded with equal benefit, to the discharge of the other. Upon every principle, therefore, of morality, equity, and common justice, if one of them paid the whole debt, he had a right, by way of contribution, as well in a court of law, as in chancery, to recover, from the other security, a moiety of the sum paid.

It was contended in the argument, that *Angle* could make no claim to contribution from *Ankeney*, because they were bound, as securities, by different instruments. But there is no foundation for such a suggestion. The doctrine of contribution is not founded in contract; but is an implied equity, resting upon the plainest principles of morals and natural justice. For, in the language of justice *Story*, "as all are equally bound, and are equally relieved, it seems but just, that in such a case, all shall contribute in proportion, towards a benefit obtained by all, upon the maxim, '*qui sentit commodum sentire debet et onus.*'" In commenting upon this subject, the learned justice, in 1 *Story's Equity* p. 549 *sec.*

495 states, that “originally, it seems to have been questioned, whether contribution between sureties, unless founded upon some positive contract between them, incurring such liability, was a matter capable of being enforced at law. But there is now no doubt, that it may be enforced at law, as well as in equity, although no such contract exists. And it matters not, in case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arise under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the same identical debt.” The same principles are laid down with equal perspicuity and distinctness in the 1 *Law. Lib.*, 160, where it is stated, that “the right to contribution exists between all sureties of the same degree, whether they are engaged jointly or severally, and if severally, whether they are engaged all in one instrument or several instruments, and whether they have a knowledge of one anothers’ engagements or not;—because, in all these different cases, a payment by one surety, is equally a benefit to all other sureties.”

It hence follows, that it would be against equity and justice to permit *Angle* to recover from *Ankeney*, more than a moiety of the amount paid by the former, in satisfaction of a debt, for the payment of which both were equally responsible. And it is equally opposed to equity and conscience, that *Washington* county court should have unconditionally arrested the arm of the law, in the suit on the law side of the court, by *Angle* against *Ankeney*; and by a perpetual injunction have prohibited the former from recovering any thing at law against the latter. It is one of the oldest and soundest maxims of chancery jurisdiction, “that he who seeks equity, must do equity.” And it is a maxim equally well established, that a court of chancery never will, against equity and conscience, interpose, by way of injunction, to arrest the progress of proceedings at law; unless required so to do, upon principles of public policy. Such principles of policy have nothing to do with the case now before us. What then should *Ankeney* properly have shewn by the statements in his bill, to entitle himself to the relief which he sought? He should have stated that he tendered to *Angle*

Mudd vs. Turton.—1846.

the moiety, with the interest thereon; of the single bill, which he had given to *Craig*; or that he was ready and willing to bring the same into court to be paid to *Angle*, unless upon the condition of his willingness to make such payment, he had no standing in a court of equity; nor even a colorable right to the interposition of such a court, in his behalf, in the mode in which he has applied for it.

It appearing to this court, upon the facts as brought before it, upon the final hearing on the bill and answers, that the purposes of equity and justice would be subserved by the granting of a perpetual injunction in this case, upon the defendant, *Ankeny*, paying to the appellant *Angle*, or bringing the same into *Washington* county court to be paid to him, one-half part of the principal and interest due on the single bill in question, this court will pass a decree reversing the decree of the court below, (but without costs in either court to either of the parties,) unless the said *Ankeny* shall, on or before the first day of June next, make such payment into said court, or to the appellant *Angle*.

DECREE REVERSED WITHOUT COSTS.

FRANCIS E. MUDD, EXECUTOR OF JOHN A. TURTON, vs.
THOMAS G. TURTON.—*December* 1846.

In the year 1839, the owner of certain slaves told the plaintiff, a physician, who had been attending them a long time before, that if he would cure them, he might have them for their medical bill; and that he must make no charge against them from that time. The slaves were then small children, and of very little value. The plaintiff attended the negroes, and they recovered. They were never delivered to him, and their owner died in 1842, having them in his possession.

Under notice from the plaintiff, to the defendant's executor, to produce the medical bill of the plaintiff against the owner of the slaves, from November 1841, to his death, in 1842, which the executor had paid after the institution of a replevin for the negroes. HELD, that the plaintiff might offer his own account, as evidence, that during the period embraced in it, he had not charged in it for medical services to the negroes in dispute, though it did contain charges for medicines, &c., to a negro child not named.

Mudd vs. Turton.—1846.

Whether the negro child, not named in the account, was one of the two, the subjects matter of the contract, was a question for the jury, and either party might have offered further evidence on that point.

The account produced under the notice, was primary evidence of what the plaintiff did claim for medical services.

A claim for services rendered—surrendered by one party to another, at the time of an agreement made in relation to a sale of slaves,—is just as available to pass title, as if money had been paid.

A medical bill, which had accrued prior to the date of a contract, agreed to be surrendered, in consideration of a sale of slaves, is evidence of a valuable consideration, passing from the vendee to the vendor.

APPEAL from *Prince George's* county court.

This was an action of *replevin*, commenced on the 10th March 1843, by the appellee against the appellant, for slaves *Bazil* and *Frank*.

The defendant below pleaded *non cepit*; property in himself, and property in one —, and not in the plaintiff; on these pleas issues were joined, and the jury found a verdict for the plaintiff upon the first and second issues.

In the trial of this cause, the plaintiff to maintain the issues on his part joined, proved to the jury, that sometime in the year 1839, the defendant's testator, *John A. Turton*, who was the father of the plaintiff, told the plaintiff, who was then attending the negroes now in controversy, as a physician, and had been so attending them for a long time before, that if he would cure the said negroes, who were at that time sick, and small children, he might have them for the medical bill; and that he must make no charge against them, from that time: to which proposition the plaintiff assented. The witness also proved, that one of the negroes was not, in his opinion, at that time worth more than five dollars; and that the other was worth nothing, by reason of their then state of sickness. The plaintiff also proved, that he continued to attend said negroes for some time thereafter, and that they recovered from their sickness under his treatment. There was no proof of any memorandum in writing of said agreement, or of any actual delivery of the said negroes; but it was proved, that the said *John A. Turton*, retained possession of the negroes up to the period of his death, which took place in August 1842, and that

Mudd vs. Turton.—1846.

they were then taken possession of by the defendant, as his executor; and remained in his possession to the time of the institution of the present suit.

The plaintiff's counsel then, for the purpose of proving the loss of the plaintiff's accounts, or medical bill against his father, produced the plaintiff himself, and offered to prove by him to the court, that his medical accounts, kept by him against his father and others, from the year 1839 to 1843, were destroyed by him in the spring of 1843, when he changed his occupation, supposing they would be of no further use to him, and that he had searched for them last night, supposing that he might find some of the fragments, and could not find them, for the purpose of letting in secondary proof; that during those years he made no charge for medical services against his father, for said negro boys.

The defendant's counsel objected to the sufficiency and admissibility of said proof, on the ground, that the plaintiff had voluntarily destroyed said accounts, by an act of his own; and that he could take no advantage of such act of destruction, but the court overruled said objection, and permitted the plaintiff to be examined for said purpose; the defendant excepted.

The plaintiff then produced by his counsel, the following notice to the defendant's counsel :—

“To *Francis E. Mudd*, executor of *John A. Turton*. You are hereby required to produce at the trial of the cause of *Thomas G. Turton* against you, the medical account presented to you by the plaintiff against your testator, and now in your possession, otherwise parol proof of its contents will be offered to the jury. WILLIAM H. TUCK, for plff.”

“November 6th, 1845.”

And proved, that the same had been served on the defendant the day before the trial, and immediately thereupon, the defendant produced before the court the following account, which is admitted to be the account called for in said notice.

The account produced under said notice was from 12th November 1841, to 21st August 1842, and amounted to \$611. It contained two charges for visits to, and medicines for, “*negro child*,” and although it contained charges for various negroes by

Mudd vs. Turton.—1846.

name, yet none for *Bazil* or *Frank*. It was proved by *T. G. Turton*, after the death of *John A. Turton*, passed by the orphans court, and paid by the executor, the appellant.

The plaintiff then proved, that the said account is made out in his handwriting, and offered said account in evidence to the jury, for the purpose of shewing, that during the period embraced in the account, he had not charged in said account for medical services to the negroes in dispute; but the defendant, by his counsel, objected to the admissibility of said account for that purpose, and prayed the court to exclude it from the jury, but the court, (KEY and DORSEY, A. J.,) overruled the objection, and permitted said account to be read to the jury, and were of opinion that it was admissible for that purpose. The defendant excepted.

2ND EXCEPTION. After the evidence had been given which is contained in the first bill of exceptions, which, by agreement, is made a part of this bill of exceptions, the defendant then prayed the court to instruct the jury, that if they find from the evidence, that the negroes in controversy were *not delivered* to the said plaintiff, at the time of the alleged agreement between the plaintiff and the testator's defendant, and that no money was paid, either in whole or in part, at that time by the plaintiff to the said testator, on account of said agreement, and that the said agreement was not in writing, that then they must find a verdict for the defendant; but the court refused to grant said prayer, and instructed the jury, if they find from the evidence in the cause, that the defendant's testator was indebted to the plaintiff for medical services rendered to said negroes, prior to the time of said agreement; and that the plaintiff stipulated to relinquish, and did relinquish said indebtedness for medical services at the time of said agreement, that then this was a part performance of the agreement on his part, and would entitle him to a verdict in the present cause, if said testimony was relieved by the jury; to which opinion of the court, as given by the jury, and to their refusal to grant the instructions as prayed for, the defendant excepted.

The defendant prosecuted this appeal.

Mudd vs. Turton.—1846.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By C. C. MAGRUDER and T. F. BOWIE for the appellant,
and

By J. JOHNSON and W. H. TUCK for the appellee.

ARCHER, C. J., delivered the opinion of this court.

According to the views which we entertain of this case, we do not consider it necessary to express any opinion in relation to the sufficiency of the oath of the plaintiff, to lay a foundation for the introduction of secondary evidence, because we consider the evidence offered in the first bill of exceptions as primary proof.

The defendant having, on notice, produced an account against the testator, rendered to the defendant by the plaintiff, commencing on the 12th November 1841, and terminating on the 21st August 1842, with the death of the testator, for medical services, the plaintiff offered the said account as evidence, that during the period embraced in it, he had not charged in said account for medical services to the negroes in dispute. The question for consideration is, therefore, whether this account was evidence, admissible for the purpose for which it was offered?

The account contains no charges for medicine, and attendance on the negroes in dispute, by name; and the difficulty arises from the entries in the account, from the 20th of March to the 5th of April 1842, in which sundry visits and medicines are charged for a negro child, to whom, no name is given in the account. As to all other items in the account, amounting to \$611, and embracing a period of about nine months, the names of the members of the family are given, for whom the services are rendered.

Whether the negro child, not named in the account, to whom services were rendered, was one of the negroes in dispute, was a question of evidence for the jury; and it was competent for the defendant to have proved the fact, if it were so. The admission of the account, as evidence of the contrary, did not preclude such proof.

Mudd vs. Turton.—1846.

The account shows, that the defendant's testator had a considerable family of negroes, there being charges in the account for attending ten, and it states in every instance, the names of the persons attended, except in the particular instance adverted to. Under such circumstances the presumption would be, that the attendance and medicine was furnished to a child whose name was unknown; or to one who might not have been named. Again, the account contains no charges for attending the negroes in dispute, anterior to 1841, for services which are proved to have been previously rendered. The abandonment of such charges, of which the account is evidence, would naturally lead us to believe, that the charges in question were not against either of the negroes in dispute, when by the agreement the plaintiff was as much bound to abstain from the one charge, as the other.

We have not deemed it necessary to enquire, on this exception, whether the evidence offered would have been secondary evidence of the contents of the plaintiff's books, because we consider the account as primary evidence of the fact, which it was offered to establish. The agreement between the parties was, that he should make no charge; or in other words, *make no claim*, after the date of the agreement, for attending these negroes. If the books had been adduced, and contained charges, they might furnish strong evidence, that no such agreement as the plaintiff relies upon, was ever made; but they would not prove a non-compliance with the agreement; if one had in fact been made. Provided no claim was made on the testator or the defendant for such charges, the agreement, as we have said, being, according to the true interpretation thereof, that no claim should be made.

Nor is it any objection to the admissibility of the account in evidence, for the purpose for which it was offered, that the account was made out by the plaintiff. The enquiry is, did the plaintiff claim for services for the negroes, within the dates of the account. The account furnishes the best evidence of what he did, or did not claim. The enquiry is, in relation to an act of the plaintiff, and he can certainly prove what he did do. Had he given a receipt in full, or a release, for every

service rendered these negroes, as it was rendered, it could not be contended, that such receipt or release would not, although made by himself, be evidence to show, that he made no claim for such services. If this be so, assuming the law to be, that the account furnishes evidence of that for which it was offered, it is equally clear, that no objection could be taken to it, on the ground suggested.

We therefore think the court were right in admitting the account in evidence, for the purpose for which it was offered.

In the second exception, objection is taken to the refusal to grant the prayer offered by the defendant, and in giving the instruction which the court gave.

It is conceded, and is certainly the law, that if a valuable consideration was given by the plaintiff at the time of the agreement, that such consideration would be as available to pass the title, as if money had been paid; and if there was evidence that such valuable consideration passed from the plaintiff, then the prayer ought not to have been granted, because the plaintiff has excluded from the consideration of the jury, a material fact, upon which the title of the plaintiff depended. Now it is clear to our minds, that there was evidence of such valuable consideration, passing from the plaintiff.

By the obvious construction of the agreement, the medical bill, which was to be surrendered, was the bill which had arisen anterior to the date of the contract. The bill subsequently to be made is not that referred to, for the agreement makes the express provision with regard to that, that he must make no charge against them for that time, which would have been wholly unnecessary if the true construction of the agreement was such as is contended for. The proposition to relinquish this existing medical account, was acceded to by the plaintiff, and by doing so, he gave up all right to recover the same, as effectually as if he had given the defendant's testator a receipt therefor. By thus surrendering his medical account, he passed to the defendant's testator a valuable consideration, just as available as if he had paid him in money, the amount of the account.

Hupe vs. Seibert, gar. of Barnes.—1846.

From the above views we are of the opinion, that the court below were right in rejecting the prayer of the defendant, in the second bill of exceptions.

The next and last enquiry is, whether the court were in error in granting the instructions which they gave in this exception?

This instruction makes the right of the plaintiff's recovery to depend, on the existence of an indebtedness for medical services anterior to the contract, on the agreement to relinquish such claim, and on the finding of such relinquishment. As to each of these facts evidence had been offered. The witness first examined, proved, that the plaintiff had attended these negroes before the date of the contract, and that he agreed to the proposition of the testator of the defendant, to surrender such bill; or in other words, that he should have them for the medical bill: and we have seen, that by such agreement he did abandon his medical bill, as effectually as if he had given an acquittance therefor. We therefore think the court committed no error in their instruction.

JUDGMENT AFFIRMED.

DAVID HUPE vs. MICHAEL SEIBERT, GARNISHEE OF ABRAHAM BARNES.—*December 1846.*

In 1839, *B* conveyed to *P* and *Y*, certain real and personal property, in trust, to pay his creditors, of which he retained possession, and the rents and profits of which he was to receive and enjoy, until the sale thereof by the trustees. In 1840, *B* applied for relief under the insolvent laws. He executed a deed of all his property to *M*, under that application; but omitted in his schedule of effects to take any notice of rent due him on account of a parcel of land conveyed to *P* and *Y*. In 1842, an attachment in virtue of a judgment recovered against *B*, in 1839, was laid in the hands of the appellee, at the suit of the appellant. The garnishee admitted a balance of rent due *B*, arising out of grain grown upon the lands in question, but did not state when he had rented, or when the rent became due. **HELD:**

1. That the proceedings of *B*, to obtain relief under the insolvent laws, were competent evidence on behalf of the garnishee; and that the schedule, and other papers relating to the application, were necessary to lay a foundation for the deed of *B* to *M*, his trustee.

Hupe vs. Seibert, gar. of Barnes.—1846.

2. That if the rent due from the garnishee accrued after the deed to *M*, and out of the land mentioned in the deed and schedule, it belonged to the trustee under the insolvent law.
3. But if the rent accrued to *B*, before his application for relief, in 1840, as it was not mentioned nor included in his schedule of effects, then, under the act of 1827, chap. 70, sec. 7, it was liable to be attached by the plaintiff.
4. There was no evidence in the record to show, when the rent, which was payable in grain, accrued; but its accrual was admitted to be after October 1839, and not stated, whether before or after the application in May 1840. The time when the grain was grown, was a question of fact for the jury, and the county court erred in instructing them they must find a verdict for the defendant.

APPEAL from *Washington* county court.

On the 6th August 1842, *David Hupe* sued out an attachment, by way of execution, on a judgment rendered at March term 1839, in his favor, against *Abraham Barnes*. The sheriff returned the writ attached, of the goods and chattels, rights and credits, of the said *A. B.*, in the hands of *M. S.*, &c. The garnishee appeared, and upon interrogatories tendered to him, answered as follows:

“That at the time the said attachment was laid in his hands, he had rented a portion of the *Montpelier* lands, which had been conveyed by said *Barnes and others* to trustees; and that the following portions of the crop raised on said lands, and to which the said *Barnes* was entitled, were in the hands of this garnishee, to wit: Two hundred eight and-a-half bushels of corn, worth forty cents per bushel. One hundred and seven bushels of corn, part damaged, worth thirty-one cents per bushel. Fifty bushels corn, frosted and damaged, worth twelve and-a-half cents per bushel. Twenty-two and-a-half bushels corn, worth twenty-five cents per bushel. Deduct from the above amount, for threshing and delivering, \$15.75. Two hundred twenty-three and-a-half bushels oats, worth twenty-five cents per bushel. Twenty-two and-a-half bushels oats, worth twenty cents per bushel. Nine bushels oats, worth twenty cents per bushel. Deduct for delivering two hundred and twenty-three bushels oats, at — cents per bushel, \$6.69. About one hundred and eleven bushels oats, worth twenty-three cents per bushel.”

 Hupe vs. Seibert, gar. of Barnes.—1846.

“Balance due on Wheat,	-	-	-	-	\$112 54
Do. Corn,	-	-	-	-	112 69½
Oats,	-	-	-	-	51 01
					<hr/>
					276 24½
Balance of oats, one hundred and eleven					
bushels worth,	-	-	-	-	25 53
					<hr/>
					\$301 77½”
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The garnishee pleaded *nulla bona*, on which issue was joined.

On the trial of this case, the plaintiff to support the issue joined on his part, offered in evidence the answers of the garnishee to the interrogatories filed in the cause.

It was admitted by the defendant, that on and before the 11th day of October 1839, *Abraham Barnes* was seized in fee and in actual possession of the property and real estate mentioned in the answer of the said garnishee, and out of which the rents and profits arose, which are mentioned in said answer. It was also admitted, that on the said 11th day of October 1839, the said *Abraham Barnes and others* executed a deed of trust to trustees, comprising the said property out of which the increment aforesaid arose, subsequent to the date of said deed. The *habendum* of that deed was as follows :

“To have and to hold the said real estate, and all the said personal estate, to the said *William Price* and *David G. Yost*, their, &c., in trust, for the following uses, &c., that is to say, as to the following real property, part of the real property above described and conveyed, that is to say, as to the said tract or farm called ‘*Kaywood*,’ and the said tract called ‘*Perseverance*,’ *in trust*, to sell the same at such time, and upon such terms and conditions, and either entire, or in such parts or parcels, and for such sums, as to them may seem meet and expedient; and as to the residue of the said real estate, to sell and dispose of the same, or of so much and such parts thereof, as may be necessary for the fulfilment of all the trusts and purposes of this deed, at such time or times, at any time after the first day of May next, as they may deem expedient, at public

Hupe vs. Seibert, gar. of Barnes.—1846.

or private sale, for cash or on credit, and upon such terms and conditions, as to them may seem right and expedient; provided, nevertheless, that until such sales made, the said *Abraham Barnes*, and the other grantors, either by themselves or their tenants, may severally be allowed and permitted, to use, occupy, and have full power and control over the same, and *receive the rents, issues and profits of the same*, but without any right or power to alien or incumber the same; and provided, also, that any crops which may be growing on the same, or any part thereof, at the time or times of the sale of the same, or any part thereof, *the said grantors* shall have full right, power, and authority, to gather and secure the same, with the right of ingress, egress and regress, for that purpose. And as touching the said personal property, other than the said slaves, in trust, as follows, that is to say, to permit the same to remain and continue in the possession, and under the power and control, of the said grantors respectively, as now held and possessed by them, until the same shall be sold by the said parties of the second part, &c., &c., it being the understanding of the parties, and the true intent and meaning of these presents, that the said slaves are to be made available only as auxiliary assets, to make good any deficiency of the other estates hereby conveyed, after the ascertainment of an actual deficit, if any, after the application of the said other property, real and personal, and not before or otherwise. And the said trustees shall apply all proceeds and avails coming into their hands, in the execution of the said trust.

1st. To the payment of necessary and proper expenses, to be by them incurred in the discharge of the trust hereby reposed in them.

2nd. To the payment of their commission of five per cent. upon all proceeds of real and personal estate, arising in the execution of this trust.

3rd. To apply the proceeds of the said real estate to the payment of the debts of the said grantors, without any priority or preference, except as the same exists by law, and to apply the proceeds of the personal property in like manner, without priority or preference, except as the same exists by law.

Hupe vs. Seibert, gar. of Barnes.—1846.

4th. In case of advances made by the said trustees to meet any pressing demands, they are to stand in respect of such advances, by substitution, in the stead of the persons so paid, and to receive payment, with interest, in the same manner as the persons so paid would have been entitled, if their debts had still remained unpaid.

5th. The said trustees shall not be liable for any loss or deterioration of property, real or personal, without actual and wilful default on their part, and neither shall be liable for the default or misconduct of the other.

6th. The surplus of real and personal property, and of bonds, notes, money or other assets, which shall remain after payment of the said debts, shall be reconveyed, handed over, paid and delivered, by the said trustees to the grantors, according to their several rights and titles to the same."

The defendant then offered in evidence the application of the said *Barnes* for the benefit of the insolvent laws of the State of *Maryland*, dated the 12th day of May 1840, and the deed of all his property to *J. T. Mason*; and also the schedule filed in said application, which schedule is as follows:

A list of the creditors, debtors, and property of *Abraham Barnes*, an applicant for the benefit of the insolvent laws of *Maryland*: One-seventh of one thousand acres of land in *Western Virginia*; one-seventh of ten or twelve lots in *Washington* city; and the reversionary interest in a deed of trust, executed to *Wm. Price* and *David G. Yost* on the 11th October 1839.

And also offered in evidence the other papers usual upon such applications.

It was admitted by the defendant, that the said schedule was in the handwriting of *John T. Mason, Esq.*, a practising attorney in the Court of Appeals of *Maryland*, and in *Washington* county court, and other courts in the State of *Maryland*. Whereupon the plaintiff, by his counsel, objected to said schedule and deed, as inapplicable and irrelevant to the issue joined in this case; and on the further ground, that the property attached is not mentioned and included in said schedule, and the same therefore does not tend to prove that the property was

Hupe vs. Seibert, gar. of Barnes.—1846.

in any other person than the said *Barnes*. The court, (MARTIN, C. J., BUCHANAN and MARSHALL, A. J.,) overruled the objection and permitted the evidence to be read to the jury. The plaintiff excepted.

The plaintiff, by his counsel, then prayed the court to instruct the jury, that the present usufructuary interest of the said *Barnes*, reserved to him in the said deed, dated the 11th day of October 1839, is not mentioned and included in said schedule, which instruction the court refused to give.

The defendant, by his counsel, then prayed the court to instruct the jury, that if they shall find from the evidence in the cause, that the deed of trust offered in evidence, was executed by the said *Abraham Barnes and others*, to *Wm. Price and David G. Yost*, on the 11th day of October 1839, for certain real estate situate in *Washington* county; and that on the 12th day of May 1840, he, the said *Barnes*, applied for the benefit of the insolvent laws of *Maryland*, and on the said last mentioned day, executed the deed of trust also offered in evidence to his insolvent trustee; and that at the time of said application, he returned the schedule of his property, which is also offered in evidence, then all the interest and estate which the said *Barnes* reserved, by and under said deed of trust, was mentioned and included in said schedule within, to the true intent and meaning of the act of Assembly in such case made and provided; that said interest is not subject to the attachment issued in this case, and that their verdict must be for the defendant, which said instruction the court gave; to which said decisions of the court respectively :

1st. In admitting the said testimony excepted to, as aforesaid.

2nd. In refusing the said instructions to the jury prayed for by the plaintiff, as aforesaid; and

3rd. In granting the prayer of the defendant, and giving the instructions given as aforesaid.

The plaintiff excepted.

The verdict being against the plaintiff, he prosecuted this appeal.

Hupe vs. Seibert, gar. of Barnes.—1846.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By JERVIS SPENCER for the appellant, and
By W. PRICE for the appellee.

SPENCE, J., delivered the opinion of this court.

Abraham Barnes made his application for the benefit of the insolvent laws of *Maryland* on the 12th day of May 1840, to *Thomas Keller*, a justice of the orphans court of *Washington* county, by whom *John T. Mason* was appointed trustee, for the benefit of the creditors of the said *Abraham Barnes*. The record shews, that the trustee gave bond, and the petitioner executed a deed to him, for all his estate, real, personal and mixed, for the benefit of his creditors, on the 12th day of May 1840; and at the same time gave a schedule of his property as follows: "one-seventh of one thousand acres of land in *Western Virginia*; one-seventh of ten or twelve lots in *Washington* city; and the reversionary interest in a deed of trust, executed to *William Price* and *David G. Yost*, on the 11th of October 1839."

The attachment in this case was issued on the 6th day of August 1842; and the sheriff, in his return, certifies, "that on the 16th day of August 1842, he attached, of the goods and chattels, rights and credits, of *Abraham Barnes*, in the hands of *Michael Seibert*, the sum of money, with interest and costs, for the use of the within named *David Hupe*, use of *C. D.* and *J. Slingluff*; and that he made known to the said *Michael Seibert*," &c. At the return of the writ of attachment, *Seibert*, the garnishee, appeared, by his attorney, to whom the plaintiff exhibited interrogatories, to which *Seibert*, the garnishee, filed the following answer: "to the first interrogatory, this garnishee answers and says, that at the time the said attachment was laid in his hands, he had rented a portion of the *Montpelier* lands, which had been conveyed by said *Barnes and others* to trustees, and that the following portions of the crop, raised on said lands, and to which the said *Barnes* was entitled, were in the hands of this garnishee," a balance due for wheat, corn, and oats, of \$301.77.

Hupe vs. Seibert, gar. of Barnes.—1846.

At the trial of this cause, the defendant, to maintain the issues on his part, offered in evidence the insolvent papers of *A. Barnes*, and among them the schedule and deed of *A. Barnes*, the petitioner, to *J. T. Mason*, his trustee. To the admissibility of which instruments the plaintiff objected, but the court overruled the objection, and the same was given to the jury, as admissible and competent evidence in the cause.

This judgment of the court raises the first question under the exceptions in this cause. It was indispensable on the part of the defendant, in order to maintain the issues on his part, to shew, that *A. Barnes* had been discharged under the insolvent laws of *Maryland*; and under the provisions of the act of 1827, chap. 70, sec. 1, it is expressly provided, that no county court, judge of a county court, or justice of an orphans court, shall grant a personal discharge under an application for the benefit of the insolvent laws of this State, until such applicant shall execute to his trustee a good and sufficient deed of conveyance for all his estate, real, personal and mixed, (except wearing apparel, &c.,) and until the trustee, so appointed, shall certify in writing to the said county court, judge or justice, as the case may be, that he is in possession of all the estate of the applicant, mentioned in his schedule.

Under this act of Assembly, the deed and schedule were admissible to shew the conveyance to his trustee. The insolvent's deed was, unquestionably, admissible evidence, and the schedule, and other insolvent papers, were necessary to lay a foundation for the introduction of the deed. The deed was evidence, whether the grain or credits attached, were named and described in the deed and schedule, or not, for by the deed all the estate, real, personal and mixed, of the petitioner, passed to the trustee, and his title was good against all the world, except a creditor under the act of 1827, chap. 70, sec. 7; and if the grain was grown, or the credit accrued, subsequent to the date of the insolvent's deed, it was the grain, or debt of the trustee, because it was the produce of his interest in the land under the deed.

The instruction asked by the plaintiff's second prayer, presented, according to the case made by the record, an irrelevant and abstract proposition.

Hupe vs. Seibert, gar. of Barnes.—1846.

It does not appear from the proceedings, that the attachment was laid upon any lands, or interest in land, which belonged to *Barnes*, the debtor, or that any such right or interest was attached. The sheriff's return to the attachment is, that he had attached in the hands of *Michael Seibert* goods and chattels, rights and credits, of *A. Barnes*, the sum of money, &c.

It certainly is no easy task to determine satisfactorily from the garnishee's answer, whether he had in his hands the grain mentioned, or owed *Barnes* the sum mentioned, the proceeds of the grain; neither is it important. It certainly was not land, or any interest in the lands, reserved to *Barnes* under the deed of the 11th October 1839.

If this grain, or the debt due for the grain, accrued to *Barnes* before he executed the deed of the 11th of May 1840, it was not mentioned and included in his schedule, and was, therefore, under the act of 1827, chap. 70, sec. 7, liable to the attachment. But if the grain, or any part of it, was grown on the lands in which *Barnes* reserved the usufructuary interest, subsequent to the date of said deed, then the grain, or such part of it as was made or grown, subsequent to the date of said deed, or the proceeds thereof, were not subject to the attachment.

There is no evidence in the record which shews when the grain was made or grown. It is admitted, that the increment accrued subsequent to the deed to *Price* and *Yost*, but it is not stated, whether before or after the deed to *Mason*, the insolvent's trustee, and as this was a question which should have been left to the jury, the court erred in taking it from them, by instructing them that they must find a verdict for the defendant.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Peters, *et al.*, vs. Van Lear.—1846.

CÆSAR PETERS, ET AL., vs. JOHN, MATTHEW S., AND JOSEPH VAN LEAR.—*December 1846.*

The testatrix, by her will, in 1828, directed her executors to manumit, by deed, all her slaves, whose age and health might be such as their manumission may not be prohibited by law, leaving it in the discretion of the executors to carry such direction into effect, at such time or times as they may judge proper and expedient. Several of her executors renounced the trust, but one of them accepted it. After a lapse of fourteen years, a number of the slaves filed their bill against all the persons alive, named as executors, including the one who took out letters, in which they alleged, that the executors refused to execute to them deeds of manumission, although not prohibited by law, and retained them in servitude for their own profit; that the testatrix left sufficient personal estate to pay her debts, without including the complainants, and no debts unsatisfied. To this bill the defendants demurred. HELD, that the facts disclosed, presented a proper case for the interposition of a court of equity, on the general principles by which that tribunal is governed in the execution of trusts and powers.

By the statute law of *Maryland* upon the subject of slavery, a claim to freedom can only be established by the judgment of a court of law, and the petition must originate in the county where the petitioner resides, under the direction of his owner.

Chancery, in this case, cannot pronounce, by its decree, the freedom of the complainants, but may direct the executor to execute deeds of manumission, and thus enable them to assert their claim to freedom in a court of law.

By the laws of this State, a slave possesses no civil rights, and, as a general proposition, it is true, that he is incapable of instituting a suit, either in a court of law or equity.

But, by the act of 1796, ch. 67, sec. 21, he has been made capable of acquiring freedom by deed or will; his ability to assert his right to freedom is therefore recognised, though, pending the controversy, he is treated as a slave.

The complainants here are under the necessity of invoking the aid of equity, that an execution of the power created by the will may be enforced.

Slaves claiming a right to freedom under the same will, each having a common interest in arresting a perversion of a trust created by it, affecting their right, may unite in the same bill to compel the executor to perform such a trust; and it is no misjoinder.

The two executors named in the will, *who renounced*, ought not to have been made defendants, and the bill as to them should be dismissed. It was only necessary to proceed against the party whose duty it was to execute the deeds of manumission, in pursuance of the power created by the will.

Equity has no power to determine, by decree, the right to freedom, nor to order an account of the value of the services of the complainants while detained as slaves.

Peters, *et al.*, vs. Van Lear.—1846.

APPEAL from the Equity side of *Washington* county court.

The bill in this cause was filed on the 12th May 1842, by *Cæsar Peters, Thomas Clemens, Alexander Clemens, Henry Jones, Isaac Clemens, Nathan Mingo, Margaret Pierce, and Sophia Clemens*, colored persons, residing in *Washington* county, and alleged, that they were, during the lifetime of *Mary Van Lear*, of, &c., and at the time of her death the servants and slaves of the said *Mrs. V. L.* That in or about the year 1828, the owner of your orators departed this life, leaving her last will and testament, which contains a provision in the words following, to wit :

“*Item*.—It is my will, and I do hereby order and direct my said executors to manumit, by deed, all the slaves which may be mine at the time of my death, whose age and health may be such, as that their manumission may not be prohibited by law, leaving it in the discretion of my said executors to carry this clause into effect, at such time or times as they may judge expedient and proper.”

Which was admitted to probate, and recorded on the 12th July 1828; that said last will and testament, with all its provisions, may be taken as part of this bill of complaint; that *John Van Lear, Jr., William V. L., Matthew S. V. L., and J. V. L.*, were nominated and declared to be the executors of said last will and testament, in and by one of the clauses of the same; that *William Van Lear* is since deceased; that *William, Matthew* and *Joseph*, renounced and refused to act as such executors; whereupon letters testamentary were granted to *John V. L.*, the only remaining executor. That *fourteen* years have elapsed since the death of their mistress, during all which time the said executors have refused to allow to your orators any benefit of the said last will and testament, and contrary to the express intention of the said testatrix, the said executors have ever since held your orators in bondage and servitude, and have refused to execute deeds of manumission to your orators, although your orators have not been prohibited by law from being manumitted, in consequence of their age or health, or any other cause whatever. And the said executors have, ever since the death of the said

Peters, *et al.*, vs. Van Lear.—1846.

testatrix, and do now hold, your orators in servitude and slavery, although there is no reason for their doing so. That the best part of the life of many of your orators, when freedom would be of most value to them, is wearing away; and that the said executors have retained, and do still retain, your orators in servitude, for their own profit and emolument, which your orators charge is contrary to good faith, and the kind and benevolent intentions of the said testatrix; to the end, therefore, that the said *John, Matthew* and *Joseph*, may answer, &c. That your orators may be decreed to be free and discharged from slavery; that the executors, or one or more of them, may be required to execute to your orators deeds of manumission; that they may be allowed, under the decree of your honorable court, adequate compensation for their services, for the time during which they have been detained in slavery by the said defendants; and that they may have such other and further relief as their case may require. Prayer for subpœna, &c.

With this bill was exhibited the will of *Mary Van Lear*, the only clause of which, considered by this court, will be found in the bill of complaint.

A supplemental bill was filed alleging, that a sufficiency of personal estate of the testatrix came into the hands of her executor to pay her debts, without including the complainants in the same, and that there were no outstanding debts unsatisfied; that the testatrix charged her real estate with the payment of her debts, in order to carry into effect the manumission of the complainants. That if the personal estate is not sufficient to pay the said debts, the real is greatly more than adequate for that purpose, and that they are entitled to call upon the defendants to sell the real estate for the payment of debts, and, if necessary, that it may be decreed to be sold.

The defendants, *John, Matthew* and *Joseph*, appeared to the bill, and demurred to the same upon the following grounds:

1st. That the complainants have not made such a case, as entitles them in a court of equity to any relief against the defendants.

2nd. That the subject matter of their complaint is not within the jurisdiction of the court.

Peters, *et al.*, vs. Van Lear.—1846.

3rd. That the complainants are not entitled to sue these defendants, in form and manner aforesaid, by reason of the personal disability of said complainants, they being slaves, and by the laws of the land disabled to sue, except by petition in a court of law.

4th. That the complainants are improperly joined in said bill and amended bill.

5th. That the complainants, or any of them, have no right to call on the said *Matthew S. Van Lear* and *Joseph Van Lear*, two of said defendants, concerning the subject of their said suit, who have no interest therein, that can make them liable to the claims of the complainants, in manner and form as by them set forth in their said bill and amended bill; and that they, the said *Matthew* and *Joseph*, are improperly made parties, as defendants to said bill and amended bill, and do demur to the same.

6th. That the subject matter of said bill and amended bill, is cognizable only in a court of law.

7th. That by reason of the discretion vested in the said *John Van Lear*, by the last will and testament of the said *Mary Van Lear*, exhibited with said bill and amended bill, to be exercised by him as executor thereof, at such time or times as he may judge expedient or proper; the complainants, or any of them, are not entitled to their freedom, or the relief prayed by them in said bill and original bill, in any or all of the matters in which they thereby seek relief, and that being slaves, they have no title to sue as aforesaid.

8th. That said bill and amended bill are deficient in this, that they do not aver the exercise of that discretion, on which alone said complainants are entitled to the execution of the deeds of manumission claimed by them.

On the 27th November 1844, *Washington* county court, (T. BUCHANAN and MARSHALL, A. J.,) sustained the demurrer and dismissed the bill.

From this decree the complainants appealed.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

Peters, *et al.*, vs. Van Lear.—1846.

By JERVIS SPENCER for the appellants, and
By WEISEL for the appellees.

MAGRUDER, J., delivered the following dissenting opinion :

The plaintiffs in error acknowledged themselves to be in a state of slavery, and as slaves, appear in chancery to seek redress. If they were now entitled to their freedom, it must be conceded, that they could not, while in their present condition, ask for any purpose the aid of that court. It is to get a title which they as yet have not, and then to assert that title in a court of law, that their bill of complaint is filed.

The mistress of these persons had, by her will, authorised her executors to manumit them, leaving it to those executors to judge when, consistently with the various provisions of her will, the manumission should be effected. Because, as the plaintiffs in error allege, the deeds of manumission ought before this to have been executed, and the executors think otherwise, the court of chancery is asked to decree that the deeds be executed, and that an account be taken of the value of their services, since the period when they ought to have been emancipated; and that the executors be ordered to pay to them the value of those services. Can the court of chancery entertain this bill?

The right of a person, born a slave, to his freedom, must depend upon our acts of Assembly. They must give him the right, and he must prove, that he has acquired it in some way authorised by law. The mode in which the right is to be obtained must be prescribed by act of Assembly. The master who desires to manumit his slave, must take care in all respects to conform to the law. He may give him freedom, by deed or will, to take effect *in presenti*, or, *in futuro*. This, because the law says so; but in order to take effect at all, it must be authorised by the law, and however manifest the intention, that intention is frustrated, if the deed or will evidencing it be not authorised by act of Assembly. There can be no equitable right to freedom; no contract to be enforced in equity, or to be the foundation of an action at law. If there could be an equitable right to freedom, it remains to be proved that this would

Peters, *et al.*, vs. Van Lear.—1846.

not enable him to petition for his freedom. A court of law, trying a petition for freedom, is not in the exercise of common law jurisdiction. Formerly, and for many years, the court itself tried those cases, as it still may; and until the jury trial was authorised, the court, in the trial of such a case, acted precisely as a court of equity; and as if the law, instead of directing the petition to be filed in the common law courts, had selected the court of chancery alone to try them.

I maintain, that courts, whether of law or equity, must derive whatever jurisdiction they possess in regard to slaves from the law; that the master himself cannot give to them any jurisdiction, and cannot give to the slave freedom, otherwise than as the law authorises.

It is said, that in this case the plaintiffs in error have a right to their freedom, but it is an imperfect right, and owing to this imperfection it cannot be asserted at law. Surely the chancery court is not to supply all the defects in the law. If these slaves cannot assert their right in a court of common law, it is because the law does not recognise the right. In the case of *Wicks ag't Chew*, 4 H. & J., 547, the petitioners might well suppose, that they had a right to their freedom, and yet neither in equity nor at law could they be parties to a suit. They are "incapable of suing either in a court of law or equity."

It may be said, that there can be no right without a remedy, *ubi jus, ibi remedium*. This is true, if the maxim be correctly understood, and if applied to this case, might disprove the alleged right. Surely, however, this is not a maxim known only to courts of equity, and now that such courts are not *officinæ brevium*, it would be difficult to prove, that this maxim can give to our courts of equity a power to supply any defect in any law, or remedy, in relation to this case. Notwithstanding this maxim, it is true, that "where cases are new in principle, it is necessary to have recourse to legislative interposition, in order to remedy the grievance." *Broome on Legal Maxims*, 92. Courts are not authorised to give a remedy wherever there is an injury; to alter, for example, the law of slander, and to give damages for words now not actionable, because, in their opinion, the person of whom they are uttered,

Peters, et al., vs. Van Lear.—1846.

is injured by the utterance of them, more, perhaps, than if the words uttered had been some of those which are actionable; we must not forget that there is *damnum absque injuria*. In very many cases indeed, "it is a hardship upon the party to be without remedy;" but, by that consideration, courts of justice ought not to be influenced. Hard cases, it has been frequently observed, are apt to introduce bad law. See *Broome, Legal Maxims*, 95, and the authorities there cited. It may be added, that hard as such laws often are when enacted by the legislature, they are very much worse when they owe their existence to judicial legislation. The maxim, *ubi jus, ibi remedium*, is rather a legal than an equitable maxim, and most of the cases in which it has been applied, are cases in which the remedy was applied in courts of law, not chancery cases. *Lex semper dabit remedium*. See *Broome*, 91.

The question here which meets us at once, is, not whether this is a case of hardship and injustice, but whether such a person can be heard in a court of equity of this State? If he cannot, the court is not permitted to judge whether it be a case for which the law ought to provide a remedy? A judge may think it against equity and good conscience to hold any slave, or a particular slave, in bondage; and may have his own notions about the right of a slave to his freedom. This, however, gives him no right to legislate any slave into his freedom, either by a decree declaring him to be free, or by directing him to be emancipated by an individual who may chance to have the *jus disponendi*.

With respect to this class of beings, it is unquestionably true, that they have no civil rights other than those which the law confers upon them, and that the legislature alone can prescribe the remedies to which they must have recourse. If our courts of equity can prescribe new modes, either of granting or obtaining freedom, then the court, having this power is, *quoad hoc*, omnipotent, and it will be found difficult to fix limits to their jurisdiction in such cases. *Ampliare jurisdictionem*, is not now, whatever may have been the case formerly, the business of our courts.

Peters, *et al.*, vs. Van Lear.—1846.

If a negro is entitled to his freedom, the law says, he shall petition for it in the county court of the county wherein the owner resides; and the law which confines him to this one remedy, takes care to secure to each party, in the trial of the case, such privileges as the legislature thinks each ought to have. No where is the chancellor, or the county court, as a court of equity, invested with power to decide any matter between a slave and his owner.

Upon what principle can a court of equity interfere in such a case? It cannot proceed upon its rule, to consider that as done which ought to be done. In *1st Story's Equity Jurisprudence*, sec. 64, g, we have an explanation of this rule, and, among other things, we are told, "that equity will not thus consider things in favor of all persons; but only in favor of such persons as have a right to pray that such things may be done."

If a court of equity can take jurisdiction of this case at all, and deal with it as a case between *cestui que trust* and trustee, it would be bound by the law of the court, to give to the *cestui que trust* all the remedy which that court affords to any person, who can rightfully appear there in that character. It cannot, consistently with its own rules, refuse to him the account which is asked, or afford partial relief, and send him elsewhere for final relief.

The question just spoken of, relative to the claim of a slave to compensation for any portion of his services, was once tried in a different form. In the case of *Queen and Ashton*, 3 H. & McHenry, p. 439, an attempt was made in an action for false imprisonment, to recover for the services of the negro, pending an appeal from the judgment of the court below. The grounds upon which that claim was resisted and defeated, may readily be supposed. But upon what principle could it be resisted in chancery, if *there* it is decided to look upon that as done, which the court thinks ought to have been done, and if it be decreed, that in detaining these negroes in bondage, the defendants were guilty of a breach of trust?

It is a settled principle of equity jurisprudence, that "where a particular remedy is given by law, and that remedy bounded

Peters, *et al.*, vs. Van Lear.—1846.

and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows.’’

Now it cannot be doubted, that the act of 1796, ch. 67, provides a remedy for all persons in bondage, who claim to be entitled to their freedom; and it also prescribes the mode of trial. In the latest compilation of our acts of Assembly it is stated, that petitions for freedom, were authorised by the act of 1715, ch. 44, and we learn this also from a former chief justice of this court, in an argument made by him so long ago as the year 1782. See *2nd H. & McHenry*, p. 29. No other mode of trial, so far as I have been able to inform myself, ever was authorised.

This, however, it may be said is a remedy, and an ample one, which the law provides for those who already have a right to freedom. The case before us, is one where the negroes have as yet, it is supposed, no right to their freedom, but they are here asking the court to give them a right to freedom, in order that they may assert it elsewhere, in the mode prescribed by the act of 1796. Whence does chancery derive any such power? The legislature has given to courts of law all the jurisdiction in the premises which it chooses to confer, and has denied, by not granting, a power to courts of equity. Can equity usurp it?

It may be conceded, that the law is defective; that justice and humanity require a supplement to the act of 1796. All that is insisted upon is, that that supplement ought to be passed by the legislature, and embrace all the cases for which further remedy ought to be provided; that courts of equity have no power to legislate for particular cases of this description, and ought not to be entrusted with any such power.

All that can be said touching these complainants is, that the testatrix authorised certain individuals to execute deeds of manumission to them, when the various provisions of the will would justify it.

If in such a case chancery can interfere, it must be because of its jurisdiction to decree the specific execution of contracts, or the execution of powers.

Now an executor, by accepting of the executorship, may be considered as agreeing or contracting to do this, as well as the other acts, prescribed by the will. It will not answer to say, that here is no valuable consideration, and therefore the agreement cannot be enforced, because, although there may be some such law elsewhere, (see *1st Bay's Rep'ts*, 260,) yet in *Maryland*, money is not required, or supposed to be the consideration for any deed of manumission executed, or to be executed; and the negroes who were parties to the case of *Wickes vs. Chew and others*, 4 *H. & J.*, 543, if they had been authorised to file a bill for the execution of a contract, could not have been resisted on the ground, that no money was paid or promised.

Even if the court possessed jurisdiction in cases like the present, it would be very difficult to prove, that the case stated in the bill, would authorise the chancellor to interfere with and control the discretion, which the will before us reposes in the executors.

These questions, however, can only arise when the law will permit persons of this description to sue in chancery, and no such law can be found in our statute book. Such persons can appear in a court of law as a plaintiff only for one purpose, because, for such purpose, the law authorises them to appear there. Even there, a person in slavery can appear for no other purpose, simply because, for no other purpose, has the law given him authority to appear there. The law might have authorised such a person, to try his right to freedom, in an action of false imprisonment, and if such had been the law, he could not have claimed his freedom by petition. So the law might have given to the chancery court the jurisdiction which it has conferred on the county courts, and then the courts of law could not have interfered in his behalf, either to try his right, or to help him to recover it elsewhere.

The law, however, has not authorised a person in slavery to sue in chancery for any purpose, and for this one reason that court is not open to him for any purpose, and can be opened to him only by the legislature.

The answer to applications like this to chancery is, that it "will not take jurisdiction, except where it is given by statute,

Peters, *et al.*, vs. Van Lear.—1846.

either by express or by necessary implication, and will not be assumed by analogy or equity of construction.”

In the case of *Fisher's Negroes vs. Dabbs and others*, 6 *Yerger Reports*, 119, it is said, “no slave can be safely freed, but with the consent of the government where the manumission takes place. It is an act of sovereignty, just as much as naturalizing a foreign subject. To permit an individual to do this at pleasure, would be wholly inadmissible.”

Such, it is believed, has always been the law of *Maryland*, and that the owner of a slave has no more authority, *without the assent of the government*, to declare that a negro, whom the State pronounces to be a slave, shall be henceforth free, than to will that any other article of property shall no longer have an owner. There is power in the State to give freedom to the plaintiffs in error; but such power does not reside in our courts, whether of equity or common law. It is as true here as in *Louisiana*, that “a negro cannot stand in judgment for any other purpose than to assert his freedom.” 9 *Louisiana Rep'ts*, 156.

MARTIN, J., delivered the opinion of this court.

The questions presented for our consideration in this case, arise on the following clause of the will of *Mary Van Lear*, which was executed on 26th July 1826, and admitted to probate on the 28th of July 1828.

“It is my will, and I do hereby order and direct my said executors to manumit, by deed, all the slaves which may be mine at the time of my death, whose age and health may be such as that their manumission may not be prohibited by law, leaving it in the discretion of the executors to carry this clause into effect, at such time or times as they may judge proper and expedient.”

It appears that *John Van Lear*, *William Van Lear*, *Matthew S. Van Lear*, and *Joseph Van Lear*, were named by the testatrix as her executors; but that *William*, *Matthew S.*, and *Joseph Van Lear*, having renounced the trust and refused to act as executors, letters testamentary were granted to *John Van Lear*, on the 24th of November 1829.

Peters, *et al.*, vs. Van Lear.—1846.

The thirteenth section of the act of Assembly of 1796, ch. 67, which authorises the owner of slaves to manumit them by his last will and testament, is in these words :

“That from and after the passage of this act, it shall and may be lawful for any person, capable in law to make a valid will and testament, to grant freedom to, and effect the manumission of, any slave, by his, her, or their last will and testament, and such manumission of any slave or slaves, may be made to take effect at the death of the testator or testators, or at such other periods as may be limited in such last will and testament, provided, always, that no manumission, hereafter to be made by last will and testament, shall be effectual to give freedom to any slave or slaves, if the same shall be in prejudice of creditors, nor unless the said slave or slaves shall be under the age of forty-five years, and able to work and gain a sufficient maintenance and livelihood at the time the freedom shall commence.”

The executor having refused to execute the power conferred upon him by the will of *Mrs. Van Lear*, after the expiration of fourteen years, the appellants filed their original bill, on the 13th of May 1842; in which, after stating that the executors had refused to execute to them deeds of manumission, although they were not prohibited by law from being manumitted in consequence of their age or health, and that they were retained in the servitude of the executors for their own profit and emolument, pray, among other things, that the executor or executors may be required by the court to execute to the complainants deeds of manumission. An amended bill was filed by the complainants on the 13th of December 1843, in which they charge, that a sufficient personal estate was left by the testatrix to pay her debts without including the complainants, and that at the date of the bill there were no outstanding debts against the estate unsatisfied.

It is clear, that the facts disclosed by these bills, and the truth of which is conceded by the demurrer, present a proper case for the interposition of a court of equity, on the general principles by which that tribunal is governed, in reference of the execution of trusts and powers.

Peters, *et al.*, vs. Van Lear.—1846.

In the case of *Mislington against Mulgrave*, 4 *Mad'x Rep.*, 254, it was held, that trustees to whom a discretionary power was given of renewing leases, had not an arbitrary power of renewal, but must renew when most for the benefit of the *cestui que trusts*.

The vice chancellor said : "I cannot allow these demurrers, without holding that the trustees have an arbitrary and capricious power with respect to the renewal of this lease, and are not to be required to give any explanation why the lease has not hitherto been renewed. Such an arbitrary and capricious power may be given to trustees, but it is not conferred by this settlement, where the trustees are to renew as occasion may require, and as they may think proper; by which it is to be understood, as they may think proper for the interests of their *cestui que trusts*." The same doctrine is announced in *Palmer against Wheeler*, 2 *B. & Beat*, 18, where the lord chancellor states the established principle, that a trustee is not allowed to abuse a discretionary power with which he is invested for the benefit of others, and which he is bound to exercise, according to the just claims of the *cestui que trusts*, by converting it into a source of emolument for himself. Such acts are regarded by a court of equity, and redressed, as a fraud upon the power created by the will.

The counsel for the appellees has, however, contended, that the bills do not present a case in which the complainants are entitled to the interposition of a court of equity, because the subject matter of the bills is not within the jurisdiction of that tribunal; and also upon the ground, that the complainants being in a condition of slavery, were disabled by the laws of the State from suing in any other mode than by a petition in a court of law.

It is certainly true, that by the statute law of *Maryland* upon the subject of slavery, a claim to freedom can only be established by the judgment of a court of law, and the petition must originate in the county where the petitioner resides, under the direction of his owner. Act of Assembly of 1796, ch. 67, section 21. And if the only question raised by the demurrer was, whether a court of chancery is authorised to adjudicate

Peters, *et al.*, vs. Van Lear.—1846.

upon a claim of freedom, we should declare, that the objections stated by the demurrer were unanswerable, and that the decree of the court below must be sustained. But, although the bills of complaint pray, that the complainants may be decreed to be free, and that as consequent upon such relief, they might be allowed adequate compensation for their services, for the time they were detained in slavery by the defendants; yet the bills also specifically pray, that the executors may be compelled to carry into effect the power granted by the will, and execute deeds of manumission to the complainants. In this aspect of the case, we think, the relief asked for by the bills, was a proper subject for the action of a court of equity,—not to pronounce, by its decree, the freedom of the complainants, but to direct the executor to execute deeds of manumission, and thus enable them to assert their claim to freedom in the appropriate tribunal, a court of law.

The counsel for the appellee has also disputed the competency of a court of equity to afford the relief sought for by these bills, on the ground, that by the laws of *Maryland*, slaves have no civil rights, except, that for the purpose of testing their right to freedom, a remedy is given to them by the act of Assembly, in the form of a petition, in a court of law.

It is established, that by the laws of this State, a slave possesses no civil rights, and as a general proposition, it is true, that he is incapable of instituting a suit either in a court of law or equity. But as he has been made capable of acquiring freedom, by deed or will, the statutes of *Maryland* recognise his ability to assert in a court of law his right to freedom, notwithstanding, pending the controversy, and before the question of freedom is adjudicated, he is treated as a slave. Act of Assembly 1796, ch. 67, sec. 21.

In the case of *Queen against Neale*, 3 *H. & J.*, 158, in *Charles* county court, the petitioner exhibited her affidavit, stating that she believed she could not have a fair and impartial trial in that court, and moved the court that the record should be removed to another county, as authorised by the act of Assembly of 1804, ch. 55. The motion was overruled. And the judgment was affirmed by the Court of Appeals, upon the

Peters, *et al.*, vs. Van Lear.—1846.

ground, "that a negro petitioning for freedom, is not competent to make such affidavit, his slavery or freedom being then *sub judice*, and if a slave, he was excluded by the act of 1717, ch. 13."

In *Fenwick against Chapman*, 9 Pet., 475, the Supreme Court say: "If an executor withholds freedom from manumitted slaves, the slaves may prefer their petition at law against the executor, or against any person holding them under him, and may recover their freedom by a judgment at law. And the slaves may do this upon the principle, that a statute never gives a right without providing a remedy; in the absence of such provision, contemplating that there is a legal remedy to secure it."

As in this case, the complainants were under the necessity of invoking the aid of a court of equity, that an execution of the power created by the will might be enforced, as preliminary to the institution of a petition for freedom in a court of law; we think, that in analogy to the right secured to the slave of preferring his petition in that court for the purpose of establishing his freedom, and on the principle so distinctly announced by the Supreme Court, in the case of *Fenwick and Chapman*, they must be regarded as *capacitated* for the purposes of this suit, and therefore able to maintain it.

The objection taken to these bills, on the ground that the complainants have been improperly joined, cannot be sustained. The late *Judge Story*, in his treatise on equity pleadings, section 285, says :

"Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is, where the parties, either plaintiffs or defendants, have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests. The cases respecting rights of common, where all the commoners may join, or one may sue or be sued for all; of parishioners to establish a general *modus*; and others of a like nature, fully exemplify the doctrine; for in all of them there is a common interest centreing in the point in issue in the cause."

Peters, *et al.*, vs. Van Lear.—1846.

The same principle, the learned commentator remarks, has been supposed properly to justify the joining of several judgment creditors in one bill, against their common debtor and his grantees, to remove impediments to their remedy, created by the fraud of their debtor, in conveying his property to several grantees. In such case the fraud equally affects all the plaintiffs, and they may jointly sue.

In the case of *Ward against Northumberland*, 2 *Anst.*, 469, the *Lord Chief Baron* says: "The cases cited of unconnected parties being joined in a suit, are, where there is one common interest among them all, centreing in the point in issue in the cause."

The authorities to which we have referred, furnish us with the true rule upon this question of pleading, and we think, that there was no misjoinder of complainants. For although the interests of the plaintiffs were independent, as it respects the freedom of each, yet each one had a common interest in arresting a perversion of the trust by the executor, and obtaining from him deeds of manumission in conformity with the intention of the testatrix.

We think, however, that two of the defendants, *William* and *Joseph Van Lear*, were improperly joined, and that the bills as to them should have been dismissed. They had renounced the executorship, and any interest which they may have had in the object of the suit, was represented by *John Van Lear*, as the executor and personal representative of the testatrix. *Story Eq. P.*, secs. 140, 141. And in a case of this kind, it was only necessary to proceed against the party whose duty it was to execute deeds of manumission in pursuance of the power created by the will.

It follows from the views thus expressed, that we think the court below had no power to determine by their decree the freedom of the complainants, nor to order an account of the value of their services, as prayed for in the bills; but that, on the case presented by these bills, the court had jurisdiction of the cause, for the purpose of directing the executor to execute deeds of manumission as required by the will. And that *William* and *Joseph Van Lear* were not proper parties to this proceeding, and that the bills, as to them, should be dismissed.

Warfield vs. Brewer and Keefer.—1846.

As we think, however, that the substantial merits of the cause will not be determined by the reversing or affirming the decree passed in this case, it is remanded to the county court of *Washington* county, sitting as a court of equity, that such further proceedings may be had as may be necessary to determine the cause upon its merits, in conformity with the act of Assembly of 1832, ch. 302, sec. 6.

CAUSE REMANDED UNDER ACT OF
1832, CH. 302, SEC. 6.

GEORGE F. WARFIELD, USE OF JONATHAN MANRO, vs. JACOB BREWER, OF JOHN, AND GEORGE KEEFER, TERRE-TENANTS OF JAMES PRATHER.—*December* 1846.

In 1822, a judgment was rendered, which was revived in 1832. In 1842, a second *scire facias* was sued out, by the assignee of the judgment against the original defendant, and his tenants of the land of which he was seized in 1822. This writ was returned *nihil*, as to the original defendant; and made known to his terre-tenants, who appeared and pleaded limitations in bar of the writ, to which the plaintiff demurred. The *scire facias* set out the original judgment, and the subsequent proceedings thereon. HELD, that as the *scire facias* did not show at what period the original defendant aliened his land, whether immediately after the original judgment, in 1822, or not until a *fiat* was obtained against him, in 1832, the absence of this necessary averment was fatal to it upon demurrer, as respected the *terre-tenants*, not proceeded against until 1842.

If the design of a *scire facias* be, to make the land of the original defendant, in the hands of his alienees, liable for a judgment, it is the practice in this State to make both the original defendant and his terre-tenants parties to the writ, by which the judgment is to be revived.

If a *fiery facias* be issued now within three years after the rendition of a judgment, it may be levied as well on land conveyed by the defendant after the judgment, as on lands belonging to him at the time of levying the *fi. fa.*

But, when the plaintiff has suffered his judgment to die, and a *sci. fa.* is necessary to reanimate it, the law presumes it to be satisfied, and where the freehold is to be affected, the tenant thereof should be made a party to protect it.

Where a judgment is revived against executors only, the revived judgment does not bind the lands of the original defendant.

Warfield vs. Brewer and Keefer.—1846.

Upon a general demurrer, the court enquires, who committed the first error in pleading?

APPEAL from *Washington* county court.

On the 16th November 1842, the appellant sued out a *scire facias* against the appellees, reciting a judgment obtained by a certain *Alexander Manro*, against *James Prather* and *Ellen Prather*, at November term 1822, for the sum of, &c.; and that a writ of *scire facias* was also sued out of *W. county* court, returnable to *March* term 1832, which was made known to *James Prather*, and fiat ordered at November term 1832, for, &c.; that *Ellen Prather* is since deceased; that said judgments were entered for the use of *George F. Warfield*; that *A. M.* is since dead, and no administration on his estate, and execution still remains to be made. The writ then commanded the sheriff to make to the said *James Prather*, and his terre-tenants, of all the lands, &c., in his bailiwick, whereof the said *J. P.*, on the 3rd Monday of November 1822, or ever afterwards, was seized, and that he, she, or they, be or appear, &c., to show cause, &c.

This writ was returned made known.

To *Jacob Brewer, of John*, terre-tenant of a portion of ground as described.

To *George Keefer*, terre-tenant of, &c.

Which were of the lands, &c., of *James Prather*, on the day of the rendition of the said judgment, at November term 1822.

The sheriff also certified, that “to my knowledge, there are not, nor is there any other terre-tenants of the aforesaid lots, or any other lands or tenements which were of the said *James Prather*, on the aforesaid day of the rendition of the said judgment, at the said November term 1822, or ever afterwards; and that the said *James Prather* hath not any thing in my bailiwick, whereby I could give him notice.”

The said terre-tenants appeared to the writ, and the cause was continued until *March* term 1843, when the said *John Brewer, of J.*, prayed oyer of the *scire facias*, and pleaded, that the original judgment on which the said *scire facias* was impetrated, was of more than twelve years' standing. The other

Warfield vs. Brewer and Keefer.—1846.

terre-tenant also pleaded, the act of limitations in the same form.

The plaintiff in the *scire facias* demurred to those pleas, and the county court rendered judgment on the demurrer against him, when he prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By WEISEL and F. A. SCHLEY for the appellant, who contended :

1st. That the original lien was preserved by the *fiat* against *James Prather* of 1832, and that it was not necessary, during the lifetime of *James Prather*, (who is still living,) to make his alienees or terre-tenants parties, in order to preserve the lien created by the original judgment.

2nd. That a *fiat* against an original defendant, is a new judgment, but has all the attributes of the original upon which it is founded; and consequently, the *fiat* of 1832, carries with it the lien of the original judgment, and affects the land then in possession of the appellees.

3rd. That in a proceeding against the terre-tenants, founded on such new judgment, and to subject to execution the lands so bound, and in their possession, the statute of limitations runs from the date of such new judgment, and not of the original judgment.

By TIDBALL for the appellees, who controverted the points of the appellant's counsel.

MAGRUDER, J., delivered the opinion of this court.

To a *scire facias* issued against the original defendant, and the appellees, as his terre-tenants, the latter pleaded, that the original judgment had been above twelve years' standing. To this there was a demurrer, which the court below overruled, and the question here is, did the court err in overruling this demurrer?

The original judgment was unquestionably above twelve years' standing, at the time when this *sci. fa.* was issued. But

Warfield vs. Brewer and Keefer.—1846.

it appears by the *sci. fa.* itself, that in order to revive that judgment, a *sci. fa.* had been previously issued against the original defendant alone, and a *fiat* obtained. It also appears, that this *sci. fa.* was issued within twelve years after that *fiat*. Can this be relied on as an answer to defendant's plea?

It would seem, that in some of our sister States, when a judgment is to be revived in the lifetime of the defendant, it is not deemed necessary to make the terre-tenants parties. See *3rd Rawle*, 273. *11 John.*, 513. In *Maryland*, however, the practice has been to make the terre-tenants, (if the design was to make their land answerable,) as well as the defendant himself, parties, when the judgment was to be revived. See *2 Harris' Entries*, 749, 763. *2nd Evans' Harris*, 487, 488. From a practice so long established, and without any reason to believe, that a contrary practice ever existed in *Maryland*, it is rather hazardous to depart.

At one period, indeed, it was decided in this State, (and by a court of which one of the judges, at least, was in practice before the revolution,) that without first issuing a *scire facias*, and making the alienee a party to it, no *fi. fa.* could be levied on land which the defendant had aliened after judgment, although issued while that judgment was alive. See *1 Har. & J.*, 471. *2 Har. & J.*, 72. This, however, has been overruled, *2 H. & J.*, 75, and in such a case it is the settled law, that if the *fi. fa.* be issued within the year and a day, (now three years,) after the rendition of the judgment, it may be levied as well on land conveyed by the defendant after the judgment, as on lands belonging to him at the time of levying the *fi. fa.* It is, however, quite a different case when the plaintiff, himself, has suffered his judgment to die, and a *sci. fa.* is necessary in order to reanimate it. The law presumes it, until revived, to be satisfied, and the purchaser has some right to presume it also, and may have purchased it under that belief. It is but justice to extend to him the benefit of the general rule, that "in all cases where the inheritance or freehold is affected, the tenant of the freehold is to be made a party." Unless this be allowed, then, although the terre-tenant purchases the land twenty years, or a longer period, after the judgment has lost

“its active energy,” and is presumed to be satisfied, it will be in the power of the defendant, if he be yet alive, to make the land of his alienee answerable for the debt, by entering a *fiat*, although if he die, and no *sci. fa.* is issued upon the judgment, until the twelve years have expired, the terre-tenant may, by the plea of limitations, protect his freehold.

It is difficult, indeed, to account for some of our notions of the law upon this subject. In 1st *Brockenborough*, 170, Chief Justice Marshall says, “a judgment at common law did not bind lands, and there is no statute which, in direct terms, creates the lien. But courts have so construed the statute which gives the *elegit*, as to infer the lien from the power to take the lands in execution. The lien then grows out of the right to issue the *elegit*, and is inseparably connected with that right.” But whence the right to issue a *fieri facias*, and under it sell lands, which the defendant had aliened *bona fide* before the writ was issued? We know, that the statute, 5 *George*, 2, *ch.* 7, did give the right to sell real estate “within any of the *British* plantations,” but, “in like manner as personal estate in any of the said plantations, are seized, executed, sold or disposed of.” But by what statute does the lien grow out of the right to issue the *fi. fa.*? How is it inseparably connected with that right?

We must, however, be bound by the decisions of our courts, and these decisions require us to say, that the lien still exists, and the real estate may be sold, notwithstanding an alienation after judgment. We know, however, of no decision by our courts, that when the judgment is to be revived, it is not necessary to make the terre-tenant a party, in order to proceed against his land, or that he is to be bound by any *sci. fa.* issued after the alienation, and to which he was not a party.

The case of *Mullikin and Duvall*, 7 *G. & J.*, decides nothing in favor of the appellant. The new judgment, in order to have “the attributes” of the original judgment, must be against the necessary parties. If the original be revived against the executors only, it certainly is not, as it originally was, a judgment to bind the lands.

Van Brunt vs. Pike and Ward.—1846.

It has all along been assumed, that the terre-tenants became so before the second *sci. fa.* was issued. In this case, however, it does not appear at what time the original defendant aliened this land. The alienation may have taken place immediately after the original judgment, or not until a *fiat* was obtained against the original defendant. Here is an omission which cannot now be supplied. Whose fault is this? Who is to suffer by it? It is apprehended, that this cannot prejudice the appellee. The plaintiff in error ought either to have guarded against this in his *scire facias*, or to have introduced the necessary matter into a replication to the plea.

If, however, the plea in this case was not the legal defence, which it is supposed to be, the question would be, who committed the first error in pleading? In the case of *Prather vs. Manro*, 11 G. & J., the court said, the *scire facias* should contain upon its face such a statement of facts, as to justify the process in respect to the form in which it issues, and the persons who are made parties to it. The objections to be taken to this *sci. fa.*, is like those in that case. See also other objections to it, in 2 *Tidd's Practice*, 173, *Phila. Edit.*, 1828.

JUDGMENT AFFIRMED.

TUNIS VAN BRUNT vs. HENRY PIKE, AND E. V. AND GEORGE W. WARD.—December 1846.

Where an appeal comes up on a case stated, it must be decided by the facts agreed on. Legal presumptions may be made, and necessary conclusions drawn, but inferences from facts, which may, or may not, be true, cannot be made by the court.

A party in possession of personal property, exercising acts of ownership over it, must be treated as the owner until the contrary appears.

A quantity of pig iron on the bank of a canal in *Frederick* county, under the care of one agent of the owner, was sold by another of his agents in *Baltimore*, who gave his receipt to the purchaser for the purchase money. The purchaser wrote to the agent in *Frederick*, to ship the iron to his agent at another place. HELD, that these facts constituted a constructive delivery of the iron to the purchaser.

Van Brunt vs. Pike and Ward.—1846.

In relation to a ponderous article of merchandise, incapable in the ordinary course of business of actual delivery, as *pig iron*, all the law requires to change the possession after a sale, is constructive delivery.

Where a party is in possession of an article intended to be affected by an attachment, he should be returned by the sheriff, as the garnishee.

Where there had been a valid sale and delivery of personal property, the act of 1834, ch. 79, which required the transfer of a non-resident to be recorded, does not apply.

APPEAL from *Washington* county court.

This was an *attachment*, to compel the appearance of *Gideon Freeborn*, *Mentor Perdue*, and *William E. Craft*, trading under the firm of *Gideon Freeborn & Co.*, at the suit of *H. Pike and Ward*, issued out of *Frederick* county court, on the 21st November 1842, and to recover the sum of \$995.55, due from *G. F. & Co.* to the appellees. The attachment was laid upon eighty-three tons of pig iron, on the same day, as the property of the debtors. *Henry Jameison* appeared, by counsel, as the garnishee of *G. F. & Co.*, having given counsel authority so to appear, but he now moved the county court to strike out his appearance, as he had not been summoned to appear to, nor notified of the attachment, by the sheriff.

The appellant now moved the court, upon the ground, that he was in the actual possession of the iron attached, by his agent the said *H. J.*, at the time of, &c., for permission to appear as claimant thereof, and was accordingly permitted to appear and defend the same from condemnation. He pleaded in bar, property in himself, and not in *G. F. & Co.*, upon which issue was joined.

At the next term, upon suggestion of the appellant, the record was transmitted to *Washington* county court for trial.

It is admitted in this case, that the iron that was attached, was, at the time it was attached, lying on the banks of the *Chesapeake and Ohio Canal*, at a place called the *Point of Rocks*, where the same had been brought from the furnace of *William E. Craft*, by *Henry Jameison*, who was employed by said *Craft*, one of the defendants in this case, to transport the same for him to his agents in *Georgetown*. That the said iron had been attached previous to the 25th of October 1842, by sundry creditors of *Gideon Freeborn & Co.*, which said

Van Brunt vs. Pike and Ward.—1846.

attachments were, on said last day, dissolved by the filing of bonds, under the provisions of the act of Assembly of 1834, ch. 79. It is further admitted, that *Reuben Rowley*, as the agent of said *Craft*, who was one of the defendants in said cases, did, on the said 25th day of October 1842, sell and dispose of the iron in question to *Tunis Van Brunt*, the party claimant in this case, the said iron then still being at the *Point of Rocks*, and did then deliver to him the account and receipt thereon, which is in the following words and figures :

“BALTIMORE, Oct’r 25th, 1842.

Tunis Van Brunt, to *William E. Craft*, DR.

To eighty-three tons of pig iron, lying at the *Point Rocks*
in *Frederick* county, at \$24.00 pr. ton, \$1992.00.

Received payment, WILLIAM E. CRAFT, by
\$1992.00. R. Rowley, his attorney.”

That the said *Van Brunt*, on said 25th of October 1842, immediately after he had so purchased said iron, sent to said *Jameison*, by *Rowley*, the following order and directions in relation to said iron :

“MR. H. JAMEISON,

Sir:—You will please to forward the eighty-three tons of pig iron lying at the *Point of Rocks*, which I have purchased of *William E. Craft*, to *Georgetown*, to the care of *F. and A. H. Dodge*, with directions to them to ship the same to my order in the city of *New York*. Baltimore, October 25th, 1842.

TUNIS VAN BRUNT.

VAN BRUNT & ADAMS, *Baltimore*.”

And the said *Rowley* also, at the same time, executed and delivered to said *Van Brunt* the following order :

“FREDERICK, Oct’r 29th, 1842.

Gent:—The eighty-three tons of iron which *Mr. Tunis Van Brunt* has directed *Mr. Henry Jameison* to take down from the *Point of Rocks*, to your care, to be forwarded to his order in the city of *New York*, you will please ship as early as possible, and write to me in the city of *New York*, if you please, when you so ship it. You will please to pay *Mr. Jameison* \$1.62½ per ton, for freighting it down, and draw for it with

Van Brunt vs. Pike and Ward.—1846.

your commission, &c., on forwarding the iron to *New York*, when it will be paid by *Van Brunt*.

Your ob't, &c., R. ROWLEY,
49 Nassau street, New York.

To F. & A. H. DODGE, *Georgetown, D. C.*”

Which two said orders the said *Rowley* delivered to said *Jameison*, on last said day, who received the same and agreed to attend to them. It is further admitted, that said iron was not taken away from the *Point of Rocks*, as directed, but remained there until the attachment in this case was levied on the same, which was on the 21st November 1842. That *Gideon Freeborn*, *Mentor Perdue*, and *William E. Craft*, the defendants in this attachment, at the time of issuing the same, resided, and still reside, out of this State. And that said *Van Brunt* also resided, at the time of said sale to him, and still resides, out of this State, but was in this State at the time he made said purchase. It is further admitted, that the said sale, and account and receipt, were never recorded in the county of *Frederick*, or elsewhere, in pursuance of the act of Assembly of 1834, ch. 79. Upon the foregoing statement of facts it is agreed, that if the court shall be of opinion, that the said *Tunis Van Brunt* did not acquire title to said iron, as against said attaching creditors in this case, then a judgment of condemnation to be entered in favor of the plaintiffs; but if the court shall be of opinion, that the said *Van Brunt* did acquire title to said iron, as against said attaching creditors, then the said attachment to be quashed, either party to be at liberty to take this case to the Court of Appeals, by appeal, or writ of error.

The county court rendered judgment of condemnation upon the said statement of facts, and *Tunis Van Brunt*, claimant of the iron, prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MAGRUDER, J.

By F. A. SCHLEY for the appellants, and
By PALMER and W. PRICE for the appellees.

Van Brunt vs. Pike and Ward.—1846.

ARCHER, C. J., delivered the opinion of this court.

In the case of *Wells, Miller, and Cooper, vs. Biscoe*, Mss. decision of this, court at Dec'r T. 1844, it was decided, that where there was a *bona fide* sale of iron in the warehouse of the *Ellicotts*, and an order for the delivery thereof, which was accepted by them in favor of the vendee, the title of the vendee should prevail against a creditor of the vendor, who issued his attachment to affect such property, notwithstanding the act of 1834, ch. 79, this court being of opinion, that such a case was not embraced by the act of Assembly adverted to, and that, therefore, it was not necessary to record such transfer.

It will be only necessary for us, therefore, to enquire, whether it appears from the case stated, there has been a sale and delivery of the goods attached in the case now before the court, before the attachment issued by the plaintiff?

The case comes up on a case stated, and must be decided by the facts agreed upon. Legal presumptions may be made, and necessary conclusions may be drawn, but we cannot make inferences from the facts which may or may not be true. These doctrines appear to be deducible from the cases in 2 *H. & G.*, 320. 3 *G. & J.*, 158, and 6 *G. & J.*, 266. That the property attached had been the property of *Craft*, is apparent from the statement.

The iron attached was in the hands of *Jameison*, the agent of *Craft*, who had brought it from the furnace of *Craft*, and who was employed by *Craft* to transport the same for him to his agent in *Georgetown*. He was thus in possession of the iron, exercising acts of ownership over it, and being thus with the *indicia* of property, must be treated as the owner, until the contrary appears.

Being thus the owner, it is equally clear, that it was sold to the claimant. This is admitted in express terms. It is admitted, that *Rowley*, as the agent of *Craft*, on the 25th of October 1842, sold and disposed of the iron to *Tunis Van Brunt*, and that he delivered to him a bill of parcels for the iron, with a receipt thereon, for the purchase money. If, to perfect the sale, the payment of the purchase were considered necessary, that fact is evidenced by the receipt on the bill of parcels, and

is to be taken by us as payment, in the absence of evidence to the contrary, and so far as the question and this statement is concerned, is just as efficacious as would be the admission, that the money was paid.

The next and only enquiry is, was the iron delivered in pursuance of the contract?

It certainly would not be necessary to prove a manual or actual delivery of the property. It consisted of eighty-three tons of pig iron, lying on the banks of the *Chesapeake & Ohio Canal*. It was a ponderous article, incapable in the ordinary course of business of actual delivery. In such a case, all that the law requires is constructive delivery, and the enquiry is, was there a constructive delivery in this case?

On the 29th of October 1842, an order from the vendee to *H. Jameison*, directing him to forward it to *F. and A. H. Dodge*, at *Georgetown*, with directions to ship to the vendee in *New York*; and also an order from the agent of the vendor, giving further directions in relation to the shipment, and the payment to *Jameison* of the freight for transportation, directed to the shipper at *Georgetown*, are presented on the 29th of the same month to *Henry Jameison*, who agreed to attend to them.

We thus perceive, that *Jameison* is notified of the sale by the vendee and the agent of the vendor; that the vendee exercises an act of ownership over the property, by appointing *Jameison* as his agent, to forward the property; that all this is done with the consent of the agent of the vendor, by his letter to *F. and A. Dodge*; that these facts are made known to *Jameison*, and that he undertakes the agency.

Now, if *Jameison* were in the possession of the property on the 29th of October, when these orders were delivered to him, and when he assumed this agency for the vendee, then within the principle of the case of *Wells, Miller and Cooper, vs. Biscoe*, above adverted to, the cases cited, there was a delivery to the vendee, and the sale was complete.

The enquiry then is, was *Jameison* in possession of the property on the 29th of October 1842? It is a fact admitted, that he was put originally in possession by the owner, *Craft*, of this iron for transportation to *Georgetown*, but before it reached

Post and Fitzhugh, vs. Sheppard.—1846.

the place of destination, it was attached by sundry creditors of *Freeborn, Perdue & Co.*, at what time does not appear; but it is admitted, that these attachments were dissolved on the 25th of October 1842. In the levy of the attachments, anterior to the 25th of October 1842, we cannot presume the sheriff disturbed the possession of *H. Jameison*, who, as agent, was entrusted therewith for transportation, because, being in possession of the iron, it was the duty of the sheriff to return him as garnishee. Upon the dissolution of the attachments, this continued possession was unaffected by the lien of the attachments. He is admitted to have been in possession anterior to the attachments, and is not shown by any evidence to have been out of possession, either voluntarily or by coercion, anterior to the day when he assented to execute the orders delivered to him, by which a change of property was effected.

According to these views, there has been a valid sale and delivery of the iron in controversy, and the transfer not requiring to be recorded, according to the decision of this court in the case of *Wells, Miller and Cooper, vs. Biscoe*, above adverted to, the judgment of the county court must be reversed, and judgment entered in this court on the case stated, that the attachment be quashed according to said statement.

JUDGMENT REVERSED.

GEORGE W. POST AND WILLIAM FITZHUGH, vs. CHRISTIAN SHEPPARD.—*December* 1846.

It is not necessary for a collector of taxes to show, that he has paid off the whole county levy, before he can maintain an action on the bond of one of his deputy collectors for a part of such levy.

The bond of a deputy collector is not a mere bond of indemnity, given for the protection of the county collector.

Deputy collectors have nothing to do with the ultimate payment over of moneys levied for county or State purposes, nor with the disposition which their principals may make thereof.

The general design of our collection system is, that the taxes shall be collected within the time prescribed by law, and then paid over by the county collectors, they having first received them from their deputies.

Post and Fitzhugh, vs. Sheppard.—1846.

A deputy of the collector of a county may be described in pleading, as the deputy collector of *W.* county, or as the deputy collector of *M.*, collector of *W.* county. Such officers have the appellation of deputy collectors of a county in common parlance, and are generally known by it.

APPEAL from *Washington* county court.

This was an action of *debt*, brought on the 4th November 1842, on the bond of the appellants to the obligee, dated 11th June 1839.

The condition of the bond was such, "that if the above bound *G. W. P.*, deputy collector of the tax of *Washington* county, shall well and faithfully execute his office, and the several duties required of him by law, and shall well and truly account for, and pay to the said *C. S.*, the several sums of money, which he shall receive or may be answerable for by law as deputy collector, then the above obligation," &c.

The bond was approved by the collector, *C. S.*, on the day of its date.

The breach was assigned in the declaration, and after stating the levy made, its amount, and being placed in the hands of *C. S.*, collector for 1839, by the commissioners, &c., charged, that although the said *G. W. P.*, as deputy, did collect and receive a large sum, &c., being part of the aforesaid levies, and was answerable as such deputy for, &c., on the 1st November 1842, being sums collected from divers of the taxable inhabitants of said county, for the levies of the year 1839, yet, &c. Another breach was assigned in the words of the condition, that he did not well and faithfully execute his office of deputy and its duties, as required by law, by reason whereof, &c.

The defendant pleaded :

1st. General performance of the condition.

2nd. That the said *G. P. W.*, as deputy collector of tax, &c., did not receive the same, &c., and did well and truly account, &c., for all sums he was answerable for, and did well and truly execute his office, as required by law.

3rd. The said *G. W. P.* also pleaded, his final discharge under the insolvent laws.

The plaintiff, to the 1st plea, replied, that *G. W. P.* did not perform; to the 2nd, that the said *G. W. P.* did not account,

Post and Fitzhugh, vs. Sheppard.—1846.

and pay the several sums he received or was answerable for, and did not well and truly execute his office, &c.

There was no replication to the 3rd plea, that being admitted by consent, and the judgment to be entered subject to it, as respects *G. W. P* only.

The jury found a verdict for the plaintiff on all the issues.

The defendants moved in arrest of judgment, for that the declaration is not sufficient in law to entitle the plaintiff to a judgment. The county court, (MARTIN, C. J., and MARSHALL, A. J.,) overruled the motion and entered judgment for the plaintiff.

The defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY and SPENCE, J.

By TIDBALL for the appellants, and

By JERVIS SPENCER for the appellee.

DORSEY, J., delivered the opinion of this court.

This suit was instituted by *Christian Sheppard*, the collector of *Washington* county for the year 1839, against the appellants, on a deputy collector's bond, given to him by *Post*, his deputy collector, for that year, with *Fitzhugh* as his surety. The jury having rendered a verdict for the appellee, on the issues joined on the breaches assigned in the *nar*, a motion in arrest of judgment was made by the appellants; to the overruling of which by the court, and the entry of the judgment on the verdict, the present appeal was taken. And the reason mainly relied upon for the reversal of the judgment is, that being a suit on a bond, with a collateral condition, the breaches assigned shew no cause of action in the plaintiff, inasmuch as they do not allege that he has been damnified, by being compelled to pay the whole, or any part of the levy imposed on *Washington* county, and placed in his hands for collection in the year 1839. This objection would appeal to the court with imposing force, if the bond of a deputy collector were a mere bond of indemnity, given to protect the county collector against recoveries that might be had against him on his official bond; or if the bond of the deputy simply required him to pay over,

Post and Fitzhugh, vs. Sheppard.—1846.

out of the moneys he should collect, such sums of money as the county collector shall first have been compelled to pay, to those on whose account the county levy was made. But such a construction of a deputy collector's bond, is utterly inconsistent with its object and design, and the purposes for which it is given. The effect of such a construction would be, in all cases where the appointment of deputies was requisite, to double the commission allowed to county collectors for making their collections, and to exclude from such appointments all who are not capitalists, or men of large fortune. Who else could accept such an appointment, if he must pay off the levy before he could call on his deputies for any portion of the taxes or assessments collected by them? Deputy collectors have nothing to do with the ultimate payment over of moneys levied for county or State purposes. Their duty is to make the collections, in the manner and within the time prescribed by law, and to pay over the amounts so collected to the collectors of their respective counties. What disposition the county collectors may make of the money thus received by them, is no concern of the deputies. The general design of our collection system is, that the taxes shall be collected within the time prescribed by law, and then paid over by the county collectors, they having first received them from their deputies. A reference to the act of 1797, chap. 43, will demonstrate the correctness of the views we have expressed on this subject.

It has been said, by the counsel of the appellants, that the bond is a nugatory act, and of no validity; its condition describing *George W. Post* as a deputy collector of *Washington* county, and there being no such officer as a deputy collector of *Washington* county, that he should have been described in the bond as the deputy collector of *Moses Sheppard*, collector of *Washington* county. There is nothing in this objection. Such officers have acquired that appellation in common parlance, and are much more generally known by it, than by the denomination of deputy collectors of *A B*, the county collector. And the duties of a deputy collector of a county, are quite as well understood by the community, and are matters of equal notoriety.

JUDGMENT AFFIRMED.

Cunningham and wife, vs. Spickler, et al.—1846.

JOSEPH CUNNINGHAM AND OTHERS, vs. NICHOLAS W. SPICKLER AND OTHERS.—*December 1846.*

The testator, by one clause of his will, directed his three sons, five years after his death, to pay his son *M*, and his daughter *E*, the sum of \$180, that is to say \$90 to each, and to be paid to them in the following proportions, viz: Two of his sons to pay two-fifths each, and the third son to pay one-fifth; on the *sixth* year, \$500 to *P*; and *seven* years after his death, the said three sons to pay, as before, to *M* and *E*, the sum of \$90 each: and so on yearly, and every year, until his daughter *P* shall have received \$1900.

By a subsequent clause of his will, he directed his three sons to pay to the children of *E*, at her death, \$1000, and the children of *M*, at his death, the sum of \$1500, and the interest on said sum to *M*, during his life, and to *E*, interest on \$1500, during her life, and no longer. *Held*, that *M* and *E*, were each entitled under this will to the interest of \$90, mentioned in both the said clauses, and that the last legacy was not a substitute for the first.

Where legacies differing essentially, both as to the time, and mode of payment and amount, are given by different clauses of the same will, to the same parties, they are accumulative.

The legacies in the first clause were payable alternately, one year to *M* and *E*, and the next year to *P*, to continue until *P* should receive \$1900. By the subsequent clause, the interest was payable for life only.

APPEAL from the Equity side of *Washington* county court.

The bill in this cause was filed on the 29th January 1844, by the appellants against the appellees, for the sale of the real property of which *Samuel Spickler* died seized. The several defendants answered the bill, and proof was taken; on the 5th February 1844, the land was decreed to be sold; the sale was made, reported and ratified. The cause was then referred to the auditor for a distribution of the proceeds, allowing to the several parties the proportions thereof to which they are respectively entitled.

The will of *Samuel Spickler*, after devising several matters to his wife, declared as follows:

“*Item*.—It is my will, that each of my sons, *John*, *Samuel* and *Jacob*, pay to my wife, as aforesaid, yearly, and every year, during her life, the sum of *twenty* dollars, and at such periods as she may require the same; and I bind the lands hereinafter willed to my sons, as aforesaid, for the full performances on the part of my sons, for the foregoing bequests, to my wife, as aforesaid.

Cunningham and wife, vs. Spickler, et al.—1846.

“*Item*.—It is my will, and I do hereby devise and bequeath to my son *John*, the farm on which I now reside, containing, &c., in fee simple, subject, however, to the incumbrances herein devised to my wife, as aforesaid, and to the following charges hereinafter mentioned to my daughter *Polly*, to the children of my daughter, *Elizabeth Sleigh*, and my son *Martin*.

“*Item*.—I give, devise and bequeath, to my son *Samuel*, in fee simple, the farm on which he resides, subject also to the provisions hereinbefore specified for my wife, as aforesaid, and the sums of money hereinafter designated, to be paid to my children and grand-children.

“*Item*.—I give, devise and bequeath, to my son *Jacob*, in fee simple, the farm on which my son *Martin* now resides, and marked on the plat aforesaid as *Martin's*, subject to the provisions hereinafter specified for my wife, as aforesaid, and also for the sums of money, hereinafter designated, to be paid to my said daughter *Polly*, my son *Martin*, and my grand-children. I also give to *Jacob* a bed, a chest, and my clothes.

“*Item*.—It is my will, that each of my sons have free egress and ingress, to and from their respective wood-lands, without hindrance or molestation.

“*Item*.—It is my will, and I do hereby order and direct, that five years after my decease, my sons, *John*, *Samuel* and *Jacob*, pay to my son *Martin*, and my daughter, *Elizabeth Sleigh*, the sum of *one hundred and eighty* dollars, that is *ninety* dollars to each, and to be paid by them in the following proportions, viz: *John* and *Samuel* to pay two-fifths each, and *Jacob* to pay one-fifth; and on the following year, that is to say, six years after my death, my sons, *John*, *Samuel* and *Jacob*, are to pay to my daughter *Polly*, or her heirs, the sum of *five hundred* dollars, *John* and *Samuel* paying two-fifths each, and *Jacob* one-fifth; and on the following year, that is to say, seven years after my decease, my sons, *John*, *Samuel* and *Jacob*, are to pay to *Martin* and *Elizabeth Sleigh*, the sum of *ninety* dollars to each of them, and to be paid by my sons in the same proportion as above, viz: *John* and *Samuel* to pay two-fifths each, and *Jacob* one-fifth, and so on yearly,

Cunningham and wife, vs. Spickler, et al.—1846.

and every year, until my daughter *Polly* shall have received the sum of *nineteen hundred* dollars, paying *Polly* alternately, and the interest to *Elizabeth* alternately.

“*Item.*—As it is my design, that my three sons shall pay to the children of my daughter, *Elizabeth Sleigh*, at her death, the sum of *one thousand* dollars, and the children of my son *Martin*, at his death, the sum of *fifteen hundred* dollars, and the interest on said sum to *Martin*, during his life, and to my daughter *Elizabeth*, the interest of *fifteen hundred* dollars, during her life, and no longer. It is therefore my will, that in the event of either or both, my son *Martin* or *Elizabeth Sleigh*, dying before either of the children of my son *Martin*, or my daughter, *Elizabeth Sleigh*, attaining lawful age, that then and in that case, the interest payable yearly to my son *Martin*, be paid for the support of his children, until each becomes of age respectively, when my sons, *John*, *Samuel* and *Jacob*, are to pay such child, when of age, his or her proper proportion of *fifteen hundred* dollars, and so on as they arrive at lawful age; and in like manner when the children of my daughter, *Elizabeth Sleigh*, arrive at lawful age, respectively, that my sons, as aforesaid, pay to him or her, the proportion that such child will be entitled to out of *one thousand* dollars, which is the sum I design for them, although the interest of *fifteen hundred* dollars is to be paid yearly to their mother, during her life, the same to be paid by my sons in the same proportion as hereinbefore directed.

“*Item.*—As it is not my design to oppress my sons, by the payment of the legacies that may become due to my son *Martin*, and the children of my daughter *Elizabeth*; and whereas it may so happen that all of their children may be of lawful age at the time of the death of my son *Martin*, and daughter *Elizabeth*, when my sons, *John*, *Samuel* and *Jacob*, would be required to pay the whole amount due to the children of *Martin*, and *Elizabeth*. It is my will, therefore, in such an event, or in the event of more than one being of age at the time of the death of their parent, that my sons pay the oldest of each their proportion, which would fall due to such child, and the next or following year to pay the next oldest, and so

Cunningham and wife, vs. Spickler, et al.—1846.

on, until they are paid off, paying interest on the balance unpaid to those who do not receive their proportion.

“*Item.*—It is my will, that my sons, *John, Samuel and Jacob*, pay, within five years after my decease, the debt I owe to the widow and heirs of my deceased brother, *Jacob Spickler*, and this will explain the cause why I have prolonged the payments which my sons, *John, Samuel and Jacob*, are herein required to make. This debt, and all other debts, which I owe, are to be paid by my sons, as aforesaid, *John, Samuel and Jacob*, without abating any thing from the legatees herein named; and all the rest and residue of my estate, both real, personal and mixed, I give and bequeath to my sons, *John, Samuel and Jacob*.

“*Item.*—Whereas the proportion of my estate herein willed to my son *John*, exceeds in value that which I have willed to *Samuel and Jacob*, it is my will, and I do hereby order and direct, that after all the money shall have been paid off by my sons, to my daughter *Polly*, to my son *Martin*, and to the children of my daughter *Elizabeth*, that then my son *John* pay to my sons, *Samuel and Jacob*, the sum of *nine hundred* dollars, to be paid by him, as aforesaid, in three yearly payments, *Samuel* to receive two-thirds, and *Jacob* one-third.”

The auditor of the court reported the following accounts, distributing the balance of \$3903.75, in the hands of the trustees of this court.

<i>Elizabeth Spickler</i> , (widow and devisee of <i>Samuel Spickler</i> , dec'd,) for arrearages of sp. charges, due under the will, from Nov. 1st, 1840, to day of sale, March 23rd, 1844,	\$121 00
<i>Elizabeth Spickler</i> , (widow aforesaid,) to be set apart as a fund, the interest of which is to supply her with said charges during her life,	687 33
<i>Elizabeth Sleigh</i> , $\frac{2}{3}$ of \$90, payable every alternate year, from 1843 to 1849, at cash value upon the day of sale,	126 22

Cunningham and wife, vs. Spickler, et al.—1846.

Martin Spickler's heirs, $\frac{2}{3}$ of \$90, payable as preceding legacies, at cash value on the day of sale, 126.22, to be divided as follows:—

<i>Mary Spickler</i> , (now <i>Mary Martin</i> ,) one-third,	\$42 07 $\frac{1}{3}$	
<i>Elizabeth Spickler</i> , one-third,	42 07 $\frac{1}{3}$	
<i>Thomas B. Spickler</i> , one-third,	42 07 $\frac{1}{3}$	— 126 22

Polly Cunningham, $\frac{2}{3}$ of \$1900, payable every alternate year, from 1844 to 1850, at cash value upon the day of sale, \$643.49. To be divided as follows:—

<i>Sarah C. Cunningham</i> , one-third,	214 49 $\frac{2}{3}$	
<i>Ellen J. Cunningham</i> , one-third,	214 49 $\frac{2}{3}$	
<i>Mary V. Cunningham</i> , one-third,	214 49 $\frac{2}{3}$	— 643 49

The children of *Martin Spickler*, $\frac{2}{3}$ of \$1500, being \$600, with int. from September 27th, 1838, to day of sale, March 23rd, 1844, \$198; making the sum of \$798. To be divided as follows:—

<i>Elizabeth Spickler</i> , one-third,	266 00	
<i>Mary Spickler</i> , (now <i>Mary Martin</i> ,) one-third,	266 00	
<i>Thomas B. Spickler</i> , one-third,	266 00	— 798 00

Elizabeth Sleigh, for arrears of int. upon $\frac{2}{3}$ of \$1500, from death of testator, September 27th, 1838, to the day of sale, March 23rd, 1844, 198 00

The children of *Elizabeth Sleigh*, $\frac{2}{3}$ of \$1000, payable to them at her death, 400 00

Elizabeth Sleigh, to be set apart for her as a fund, which, together with the preceding \$600, will yield the sum of \$36, $\frac{2}{3}$ of \$90, the int. of \$1500, 200 00

Balance for distribution, 378 26

\$3678 52

Cunningham and wife, vs. Spickler, et al.—1846.

<i>Samuel Spickler</i> , $\frac{2}{3}$ of \$900, payable in 1850, being at its cash value, \$433.31, which is entitled to a distributive share, amounting to,	\$252 33
<i>Jacob Spickler</i> , $\frac{1}{3}$ of \$900, payable in 1850, being at its cash value, \$216.60, which is entitled to a distributive share amounting to \$125.93, to be divided among his heirs at law, as follows:—	
<i>Samuel Spickler</i> , one-fifth, . . .	\$25 18 $\frac{3}{4}$
<i>Polly Cunningham's</i> heirs:—	
<i>Sarah C. Cunningham</i> , one-third of one-fifth,	8 39 $\frac{3}{4}$
<i>Ellen J. Cunningham</i> , one-third of one-fifth,	8 39 $\frac{3}{4}$
<i>Mary V. Cunningham</i> , one-third of one-fifth,	8 39 $\frac{3}{4}$
<i>Martin Spickler's</i> heirs:—	
<i>Elizabeth Spickler</i> , one-third of one-fifth,	8 39 $\frac{3}{4}$
<i>Mary S. Spickler</i> , (now <i>Mary Martin</i>), one-third of one-fifth,	8 39 $\frac{3}{4}$
<i>Thomas B. Spickler</i> , one-third of one-fifth,	8 39 $\frac{3}{4}$
<i>Elizabeth Sleigh</i> , one-fifth, . . .	25 18 $\frac{3}{4}$
<i>John Spickler's</i> heirs:—	
<i>Joseph Cunningham and wife</i> , one-seventh of one-fifth,	3 59 $\frac{3}{4}$
<i>Nicholas W. Spickler</i> , one-seventh of one-fifth,	3 59 $\frac{3}{4}$
<i>Margaret Spickler</i> , one-seventh of one-fifth,	3 59 $\frac{3}{4}$
<i>Eleanora Spickler</i> , one-seventh of one-fifth,	3 59 $\frac{3}{4}$
<i>Martin Spickler</i> , one-seventh of one-fifth,	3 59 $\frac{3}{4}$
<i>Calvin B. Spickler</i> , one-seventh of one-fifth,	3 59 $\frac{3}{4}$

Cunningham and wife, vs. Spickler, et al.—1846.

<i>Sarah A. Spickler</i> , one-seventh of		
one-fifth,	3 59 $\frac{1}{2}$	125 93
		<u>\$378 26</u>

The complainants and the infant defendants, excepted to the audit.

1st. Because interest is allowed by it on two-fifths of the legacy of \$1500, bequeathed to the children of *Martin Spickler*, from the death of the testator, *Samuel Spickler, Sen.*, when such interest should commence from the termination of five years after said death.

2nd. Because it allows arrears of interest on two-fifths of \$1500, bequeathed for her benefit, from the death of said testator, *Samuel Spickler, Sen.*, when such arrears should commence from the termination of five years after the death of said testator.

3rd. Because *Elizabeth Sleigh* is allowed the sum of \$126.22, being two-fifths of \$90, payable every alternate year, from 1843 to 1849, at cash value on the day of sale; which in the way stated, as a sum distinct and independent of the interest of \$1500, which is allowed her in another part of the account, she is not entitled to receive.

4th. Because the same error occurs in the allowance of the same sum of \$126.22, to the heirs of *Martin Spickler*.

5th. Because the will of *Samuel Spickler* evidently intended to give to the heirs of *Martin Spickler*, the interest of \$1500, and no more; and to *Elizabeth Sleigh*, the interest of \$1500, and no more; and the payment of said interest not to commence until five years after his death; two-fifths of which was charged on *John Spickler*; whereas by said account, said *Martin's* heirs, and *Elizabeth*, are allowed the interest from the time of the death, and are also allowed another charge, each, of \$90, every other year; which said *Samuel* did not intend to give.

6th. Because the interest on \$1500, to the heirs of *Martin*, and to *Elizabeth*, is allowed, from the time of *Samuel Spickler's* death, whereas it ought to commence five years after his

Cunningham and wife, vs. Spickler, et al.—1846.

death, and be paid only every other year, (or every alternate year,) until the said *Samuel's* daughter *Polly* received \$1900, as provided for in the will, to wit, in 1849.

On the 16th April 1845, *Washington* county court, (T. BUCHANAN, A. J.,) finally ratified the audit, and both parties appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MARTIN, J.

By J. SPENCER for the appellants, and

By ALEXANDER RANDALL for the appellees.

SPENCE, J., delivered the opinion of this court.

This is an appeal from the equity side of *Washington* county court, overruling exceptions to, and finally ratifying, the account and statement of the auditor.

The subject of review, is the construction of the will of *Samuel Spickler*, and is presented by the eleventh and twelfth clauses of that instrument, which are as follows :

“It is my will, and I do hereby order and direct, that five years after my decease, my sons, *John*, *Samuel* and *Jacob*, pay to my son *Martin*, and my daughter, *Elizabeth Sleigh*, the sum of one hundred and eighty dollars, that is, ninety dollars to each, and to be paid by them in the following proportions, viz: *John* and *Samuel* to pay two-fifths each, and *Jacob* to pay one-fifth; and on the following year, that is to say, six years after my death, my sons, *John*, *Samuel* and *Jacob*, are to pay to my daughter *Polly*, or her heirs, the sum of five hundred dollars, *John* and *Samuel* paying two-fifths, and *Jacob* one-fifth; and on the following year, that is to say, seven years after my decease, my sons, *John* and *Samuel*, and *Jacob*, are to pay *Martin* and *Elizabeth Sleigh*, the sum of ninety dollars to each of them, and to be paid by my sons in the same proportion as above, viz: *John* and *Samuel* to pay two-fifths each, and *Jacob* one-fifth, and so on yearly, and every year, until my daughter *Polly* shall have received the sum of nineteen hundred dollars, paying *Polly* alternately, and the interest to *Elizabeth* alternately.”

Cunningham and wife, vs. Spickler, et al.—1846.

The twelfth clause is as follows :

“*Item*.—As it is my design, that my three sons shall pay to the children of my daughter, *Elizabeth Sleigh*, at her death, the sum of one thousand dollars, and the children of my son *Martin*, at his death, the sum of fifteen hundred dollars, and the interest on said sum to *Martin*, during his life, and to my daughter *Elizabeth*, interest of fifteen hundred dollars, during her life, and no longer.”

The question presented for our decision under these two clauses of *Samuel Spickler's* will is, whether *Martin Spickler* and *Elizabeth Sleigh* took two legacies each, viz: the ninety dollars, payable to each of them five years after the testator's death, as provided by the eleventh clause of testator's will, and the interest on fifteen hundred dollars, given to each of them for life, in the twelfth clause? or whether, the last legacy in the twelfth clause was substituted for the legacy in the eleventh, and they each took but one?

These legacies differ essentially, both as to the terms of payment, and amount to be paid. The legacy by the eleventh clause, or the first payment of that legacy, is to be made five years from the testator's death, and to be paid every alternate year, until the daughter, *Polly*, has received nineteen hundred dollars; that given by the twelfth clause, is to be paid annually from the testator's death, until the death of the legatees.

The counsel for the appellant relied very much upon *C. J. Kent's* opinion, in the case of *Dewitt vs. Yates*, 10 *Johns. Rep.*, 158, but that case differs very widely from this; in the former case, the same sum of money is given twice, in the same instrument, to the same legatee. It is true, the learned judge in that opinion says, “the general rule on this subject, from a review of the numerous cases, appears evidently to be, that where the sum is repeated, in the same writing, the legatee can take only one of the sums bequeathed. The latter sum is held to be a substitution, and they are not taken cumulatively, unless there be some evident intention that they should be so considered.”

Cunningham and wife, vs. Spickler, et al.—1846.

This case is clearly distinguishable from the one now under consideration; in the former case, the testator, *Peter Yates*, gave to his daughter *Maria's* children, of her body, two hundred and fifty pounds, each of them to have fifty pounds when they come of age, or when they, or each of them, should marry.

In a subsequent part of the will, the testator having devised the half of a farm to his son-in-law, *Philip Vanderbergh*, and his wife, and the other half to his wife, &c., directs as follows: In consideration of which, it is my will, and I do hereby order, "that the said *Philip Vanderbergh*, his heirs, &c., shall pay to the children of my said daughter *Maria*, to wit, *Sarah*, (the wife of the plaintiff,) *John*, *Maria*, *Catalina*, and *Catharine*, the sum of two hundred and fifty pounds, equal to six hundred and twenty-five dollars, to be paid unto them, and each of them, in sums of fifty pounds, as they shall respectively arrive at the age of twenty-one years, or on the day that they, or either of them, shall marry." The only material variation in the two bequests is, "that in the latter instance, the legacy was charged upon *Philip Vanderbergh*, in respect to the real estate to him devised."

In the case now under review, *John Spickler*, the testator, by his will, in the eleventh clause, gives to his son *Martin*, and his daughter *Elizabeth*, the sum of one hundred and eighty dollars, to be paid to them five years after his death, and ninety dollars to each of them, seven years after his death; and so on, ninety dollars each, every alternate year, until his daughter *Polly* shall have received nineteen hundred dollars. By the twelfth clause, he gives to *Martin* and *Elizabeth* each, the interest of fifteen hundred dollars annually, from the death of the testator, until the death of the respective legatees. Can it be imagined, that legacies differing so essentially, as to time of payment, mode of payment, and amount to be paid, were intended by the testator to constitute but one legacy to each of these legatees? Or, can it be gravely contended, that this case falls within the rule which *C. Kent* states, has the sanction of the numerous cases referred to in his opinion? *Roper*, in his treatise on legacies, on the authority of *Windham*

Middlekauff vs. Barrick, et al.—1846.

vs. *Windham*, *Finch R.*, 267, and *Curry against Pile*, 2 *Bro. C. C.*, 225, announces it to be law, that “when the legacies given by the same testamentary instrument, to the same person, are of different amounts, the legacy shall be considered accumulative.”

Mr. Justice Aston, in his opinion in *Hooley vs. Hatton*, reported in a note to the case of *Ridges vs. Robinson and others*, 1 *Bro. Ch. Cas.*, 389, where the Lord Chancellor says, the very able opinion of *Mr. Justice Aston* contains the whole doctrine of the law upon the subject. In that opinion *Mr. J. Aston* asserts, “that the law seems to be, and the authorities only go to prove the legacy not to be double, where it is given for the same cause, in the same act, and *totidem verbis*, or only with small difference.” The same judge, in the same case, uses this expression, “as to a larger sum, after a less, *Ricard*, 421, *folio edition*, says, where they are in the same instrument, the two sums are not blended, but the legatee has two legacies, and the heir must show, that the one was intended to be blended with the other, the presumption being in favor of what is written.” Decree affirmed without costs, and cause remanded for further proceedings.

DECREE AFFIRMED AND CAUSE REMANDED.

DANIEL S. MIDDLEKAUFF vs. JACOB BARRICK AND OTHERS.
December 1846.

M agreed with *B* and *H*, to sell them lands in *Maryland*, in consideration of which they agreed to deliver to him conveyances which they held, for certain lands in *Illinois*. The contract contained no covenant nor warranty of title. The case, in fact, was clear of fraud or misrepresentation, and the bill did not allege mistake. The purchasers of the *Maryland* property were let into possession. The conveyances of the *Illinois* land to *M*, were delivered. *M*, finding he could not recover possession under them, filed his bill to cancel his agreement with *B* and *H*; and to be restored to his original possession. HELD, that a mistake as to title, in which both parties participated, and by which both might be injured, in the absence of warranty, fraudulent misrepresentation, or concealment, would not entitle the complainant to have the contract vacated.

Middlekauff vs. Barrick, et al.—1846.

It was the duty of *M*, to have investigated the title to the *Illinois* lands, or he might have protected himself against injury, by appropriate covenants; having done neither, the loss is the consequence of his own supineness. In this case, the grantors of the deeds for the *Illinois* land were not parties. In their absence, the court could not assume their title of no value, and cancel those deeds. To give relief, by restoring possession of the *Maryland* lands, would be to enable *M* to regain them, while he retained title to the *Illinois*, and a right to sue on the covenants to him. If a purchaser has taken a conveyance, and there be no fraud, he has no remedy, though evicted for want of title, except upon the covenants in his deed.

APPEAL from the Equity side of *Washington* county court.

On the 18th July 1843, the appellant filed his bill praying subpœna, against *Elizabeth Lawrence*, *Alexander Neill* and *Andrew Kershner*, and order of publication against *Jacob Barrick* and *George W. Himes*, which was duly published.

The bill was founded upon the following contracts:—

“In consideration of the matters hereinafter mentioned, *Elizabeth Lawrence* agrees, upon the full payment of the whole purchase money, as presently herein directed, to convey by a good deed to *Daniel S. Middlekauff*, his heirs or assigns, a parcel of woodland belonging to the farm at present tenanted by one *Makle*, the boundary of which parcel of woodland, is to commence at a corner formed, &c.

“And in consideration of the above agreements by the said *E.*, the said *D. S. M.* agrees to pay for the above described parcel of woodland, at the rate of \$55 per acre, &c. And the said *E. L.*, agrees to deliver immediate possession of the said premises. In witness whereof we have hereunto set our hands and seals, this 23rd February 1836.

DANIEL S. MIDDLEKAUFF, (Seal.) ”

“And the said *E. L.*, agrees to execute a deed, as above stated, conveying a good title and warranty of title.

E. LAWRENCE, (Seal.) ”

Endorsed.

“Received January 9th, 1838, of *D. S. M.*, \$533.—Sept. 11th, 1838, *D. M.* executed his two promissory notes to *Mrs. E. L.*, for all payments due up to the 1st April 1839.—Nov. 10th, 1838, *D. M.* this day executed his promissory note to *Mrs. L.* for \$824.25, the amount due on the last payment.”

Middlekauff vs. Barrick, et al.—1846.

The said contract was also endorsed.

“I, *D. S. M.*, for and in consideration of certain lands in *Illinois*, sold me this day, have bargained, sold and transferred all my right, title, interest and estate, in the within contract, to *Jacob Barrick* and *George W. Himes*, and I hereby authorise and request *Mrs. E. L.*, to execute a conveyance for the same to the said *B.* and *H.*, hereby releasing to them all my interest herein. In witness whereof, I have hereunto subscribed my name and affixed my seal, this 10th September 1840.

D. S. M., (Seal.)”

“Articles of agreement made this 8th day of January 1839, between *Alexander Neill* and *Andrew Kershner*, trustees for the sale of the real estate of *Elizabeth Lawrence*, and *D. S. M.* Witnesseth, that for and in consideration of the covenants and agreements hereinafter mentioned, the said *N.* and *K.*, trustees as aforesaid, have this day sold to the said *M.*, the farm of said *L.*, containing, &c., at, &c., of, &c., per acre, for each and every acre said farm may contain. The said *Middlekauff*, on his part agrees to pay the sum of, &c., as follows, viz., &c. Possession of the same to be taken on the first day of April next, the tenants’ rights reserved; on payment of the whole purchase money, a deed will be executed by said trustees.”

These articles were endorsed.

“For value received I hereby assign, transfer and make over all my right, title, interest and estate, in the within agreement, to *Jacob Barrick* and *George W. Himes*, and I hereby authorise the trustees to execute a conveyance of the same to said *B.* and *H.*—*D. S. M.*—Sept. 10th 1840.”

“Memorandum of a contract entered into this 10th of September 1840, between *D. S. M.* and *Jacob Barrick*, and *George W. Himes*, of *Pennsylvania*. Whereas the said *D. S.*, has this day bargained and sold, &c., to the said *J.* and *G.*, all those two parcels of land as purchased by the said *D.* from *E. L.*, and from *A. N.* and *A. K.*, trustees for said *E. L.*, containing in all, &c., for a more perfect description thereof, reference is made to the several contracts entered into by the said *Daniel* with the said *Elizabeth* and the trustees aforesaid; and whereas the said *D.* has, in considera-

Middlekauff vs. Barrick, et al.—1846.

tion thereof, received conveyances from certain persons procured by the said *B.* and *H.*, for certain lands in the *State of Illinois*, which said conveyances the said *B.* and *H.* have this day delivered to the said *M.* And whereas the property sold to *B.* and *H.* by the said *M.*, is incumbered by liens upon it to the amount of \$4000, and upwards, and until said liens are paid no deeds for the same can be obtained, either by the said *M.* or his assignees, and it being the intention of the parties aforesaid, that but \$2000, part of said sum of \$4000, shall remain a lien upon said land, and which his assignees, the said *B.* and *H.*, are to pay.

“Now therefore it is covenanted and agreed, by the said *M.*, in consideration of the said *B.* and *H.* delivering up the conveyance of the *Illinois* land, aforesaid, to him, that he the said *M.* will fully pay all liens and incumbrances upon said land, over and above the sum of \$2000, that is to say, he will fully pay to *E. L.*, the amount of money due to her upon the land, and procure a deed from her to said *B.* and *H.*, or their assignee, and that he will at all times hereafter defend and save the said *B.* and *H.*, harmless, from the payment of any sum, but the said sum of \$2000, which they the said *B.* and *H.* bind themselves to pay. And he, the said *M.*, further agrees to pay the trustees aforesaid, the debt by him due them, so as to reduce the same to the sum of \$2000, and the said *B.* and *H.*, on their part, covenant and agree, to become responsible to said trustees, and to pay them on *M.*'s contract the sum of \$2000, with interest thereon, from, &c., or sooner, if possession is delivered; and should there be any taxes or tax lien upon said land, so as aforesaid given, granted and sold, or proved so to be by said *B.* and *H.*, in *Illinois*, they, the said *B.* and *H.*, agree to pay the same, on his, the said *M.*, producing the collector's certificate of the amount, and of his payment thereof. In witness whereof, the said parties hereto have subscribed their names and affixed their seals, the day and year first aforesaid.

D. S. M. (Seal.)

J. B. (Seal.)

G. W. H. (Seal.)”

Middlekauff vs. Barrick, *et al.*—1846.

“I, *D. M.*, have this day received from *B.* and *H.*, conveyances for the land in *Illinois*, called for in the within agreement.—*D. S. M.*—Sept. 10th, 1840.”

“We, *J. B.* and *G. W. H.*, have this day received assignments from *D. M.*, for the land owned by him in *Washington* county, and called for by the within agreement.—*J. B.*, *G. W. H.*—Sept. 10th 1840.”

One indenture delivered to *D. S. M.* by *B.* and *H.*, was made 24th August 1840, between “*George Albright*, and *Sarah his wife*, *Jacob Long*, and *Margaret his wife*, late *Margaret Albright*, *James Ferman*, and *Catharine his wife*, late *Catharine Albright*, all of the city of *Lancaster*, in the State of *Pennsylvania*, and *John Albright*, and *Ann Maria his wife*, of the county of *Huntington*, in the State aforesaid, of the first part, and *Daniel S. Middlekauff*, of the county of *Washington*, in the State of *Maryland*, of the second part, witnesseth,” &c.

Another indenture was made on the 8th September 1840, between “*Henry Smith*, and *Susanna his wife*, *George C. Cockran*, and *Margaret his wife*, *Lewis S. Ferney*, and *Mary his wife*, of the borough of *Waynesboro*, *Washington* township, *Franklin* county, and commonwealth of *Pennsylvania*, of the one part, and *Daniel S. Middlekauff*, of *Washington* county, and State of *Maryland*, of the other part, witnesseth,” &c.

And alleged, that the lands in *Illinois*, sold him by *B. & H.*, were in the possession of the heirs at law of *Jacob W. Albright*, who refused to deliver them up; that these were greatly incumbered with tax titles, and for taxes, and had been sold for taxes before his purchase; that the parties mentioned in the deeds, procured by *B.* and *H.* to complainant, were not the heirs at law of *J. W. A.*, and said deeds convey no right or interest to complainant; that his efforts to establish his title in *Illinois*, ended in expense and trouble, without success. That the said *B. & H.* had fraudulently represented the title of the *Illinois* land to him, and deceived him in that particular, when he contracted with them; that complainant delivered *B. & H.* possession of the *Washington* county lands, which they retain

Middlekauff vs. Barrick, et al.—1846.

without deeds, from the original vendors, while he is still responsible for the payment of the balance due of the original purchase, and for which there is judgment against him. Prayer, that the contract and assignment made between complainant and *B. & H.*, may be given up and cancelled, as having been obtained by fraud, and without any consideration; that he may be restored to the possession of his property in *Washington* county, as fully as he had it before said contract was entered into; for an account of rents and profits; and that *L. N. & K.* may convey to him, upon payment of the balance of purchase money; and for general relief.

The answer of *Jacob Barrick* admitted, that the complainant did purchase from *Mrs. E. L.*, *A. N.* and *A. K.* And that the contracts for said several purchases are truly exhibited by the complainant. But this defendant does not know, what payments were made by the complainant upon said purchases. He does know, that at the time of the contract between the complainant and the defendants, for the purchase of said lands, there were liens and incumbrances, for purchase money, upon them to the amount of more than \$4000; that some time in the autumn of 1840, *M.* called on this defendant, and proposed to sell this defendant the above mentioned lands, this defendant did not first apply to said *M.* to buy the same; at the instance of said *M.*, a negotiation concerning the sale and purchase of said lands, was opened with this defendant, and this defendant on behalf of himself and the said *Himes*; arranged the terms and conditions of said contract, and concluded the same, by entering into the articles of agreement exhibited by the bill; that at the time of entering into said contract, the sum of \$2000, which the defendant agreed to pay on said land to *Mrs. L.*, and her said trustees, as set forth in said agreement, amounted, in the judgment of this defendant, to more than two-thirds of the whole value of said lands, and that the lands in *Illinois*, given in part in exchange therefor, constituted much the smallest portion of the consideration. This defendant believes, that the said *Maryland* land, covered as it is by the liens aforesaid, would not now sell for a price much above the \$2000, and interest thereon, which the defendants are bound to pay on

Middlekauff vs. Barrick, *et al.*—1846.

said land by the terms of their said contract; that he and the said *Himes*, nor either of them, never did agree to warrant and defend the title to said *Illinois* lands; that in dealing with the said *M.* for said lands, he acted in good faith; that the grantors in the deeds exhibited by the complainants, represented to this defendant, that their title for said *Illinois* land was good, that these defendants paid them a fair price for said lands, and if any fraud, deception or concealment was practised in the case, it was by said grantors, and not by this defendant. And this defendant is advised, that the remedy of the said *M.*, if he have any remedy, is against the said grantors, and not against the defendants in this cause. This defendant further saith, that the said *M.* agreed to accept, and by the terms and conditions of said written agreement of the 10th September 1840, did accept, of said deeds for the *Illinois* lands, without any general warranty of title, or warranty against incumbrances from said grantors. And this defendant denies all fraud, deceit, misrepresentation and concealment, on his part, in reference to the purchase and exchange of said lands, or in the negotiations thereof, as charged by the complainant in said bill of complaint. This defendant denies that he practised any fraud or deceit, by representing to the said *M.*, that the only incumbrances on said lands, were taxes, and tax liens, nor does he admit that he made such representations; that if said lands had been previously sold for taxes, this defendant had no knowledge of it. And he denies expressly, that he concealed from the said *M.* any knowledge or information which he was in possession of, in relation to liens for taxes, or incumbrances on said lands, or the title thereto. Relying upon the representations which he had received, from the parties from whom he purchased said land, he believed there were no liens or incumbrances upon said lands, save the taxes and tax liens: and for the payment of them, he was willing to provide, and did provide by the article of agreement aforesaid. And these defendants have at all times been willing to comply with the terms and conditions of the contract on their part. And this defendant denies, that the complainant has taken every possible step, for the purpose of establishing and investigating his title to said

Middlekauff vs. Barrick, et al.—1846.

lands in *Illinois*, as alleged in said bill, on the contrary thereof, charges, that the complainant has taken no legal or proper steps, at all; to establish such title. Nor does this defendant admit, that the legal title to said *Illinois* lands was not vested in the grantors in the deeds aforesaid, at the time said deeds were executed. But if there were such defect in their title, the defendants in this cause are not bound to make that title good. And this defendant admits, as set forth in said bill of complaint, that in pursuance of the terms of said agreement, the said *M.* assigned the contracts with *Mrs. L.*, and her trustees, to these defendants, and delivered possession of said lands in *Maryland*, to the defendants in this cause, in the spring of 1841, and that they have ever since been in possession thereof. And this defendant charges, that the complainant has acted fraudulently towards these defendants, in not paying off the liens upon the *Maryland* land, over and above the sum of \$2000, which, by the terms of his agreement, he was bound to do, but has suffered said lien and incumbrance to remain unsatisfied, as this defendant believes. And these defendants are now in danger of having the whole of said *Maryland* lands sold to pay off said liens.

The other parties also answered the bill.

A general replication was filed, and proof taken.

On the 13th April 1845, the county court, (*MARTIN, C. J.*, and *MARSHALL, A. J.*.) delivered the following opinion.

It appears by the contract of the 10th September 1840, that *David S. Middlekauff*, had bargained and sold to *Jacob Barrick* and *George W. Himes*, a tract of land in *Washington* county, which he had purchased from *Mrs. Lawrence*, and her trustees, in consideration of certain conveyances of lands, in the State of *Illinois*, procured by *Barrick* and *Himes*.

The *Illinois* lands were conveyed to the complainant, not by *Barrick* and *Himes*, but by persons who professed to be the proprietors of the said lands.

The consideration paid, in part, by the defendants to the complainant, for the *Washington* county estate, was the procurement and delivery to him of those deeds. The first deed is dated on the 24th of August 1840, and the second on the 5th

Middlekauff vs. Barrick, et al.—1846.

of September of the same year, and appear to have been delivered to *Middlekauff*, on the day of the contract. On the same day, *Middlekauff* assigned to the defendants, *Barrick* and *Himes*, his interest in the *Washington* county lands, the legal title to which still remained in *Mrs. Lawrence*, and her trustees. The possession of this property was delivered by *Middlekauff* to *Barrick* and *Himes* in 1841. It appears that the grantors in the deeds of the 24th of August, and of the 8th of September 1840, had no title to the lands professed to be conveyed by them.

The land in question was the property of *Mrs. Albright*, who according to the statute law of *Illinois* became entitled to it upon the death of her daughter, intestate and without issue. There has been then a failure of title.

On this ground, the bill has been instituted to vacate the contract. The deeds contain no general warranty of title.

In the contract of the 10th of September, there is to be found covenants between the parties on the subject of the incumbrances and liens, to which the *Washington* county and the *Illinois* lands, were or might be liable, but there are no covenants relative to the sufficiency of title. On this subject the contract is silent. The bill charges, that at the time of the delivery of the deeds in question to *Middlekauff*, the grantors had no title to the lands in *Illinois*. That the defendants, *Barrick* and *Himes*, were aware of this defect in the title professed to be conveyed to the complainant, but concealed their knowledge of it; and in passing those deeds to the complainant, were guilty of fraudulent misrepresentation and concealment. The answers of the defendants directly deny this allegation, and being responsive to the bill, must be regarded as conclusive, unless, according to the well established rule of evidence, they are overcome by the testimony of two witnesses, or one witness with corroborating circumstances. It is not pretended that there is in this cause, any testimony which can be considered as disproving these responsive averments of the answers, and the charge of fraudulent misrepresentation and concealment, in reference to the title of the grantors to the *Illinois* lands, is to be held as not proved, and therefore dismissed in

Middlekauff vs. Barrick, et al.—1846.

the examination of the case. It has been contended, that if there was no fraud in this transaction, yet there was an essential mistake in it, and on that ground the contract ought to be vacated. There may have been in this transaction, a mistake. The conveyances of the *Illinois* lands, may have been procured and delivered by the defendants to the complainant, and accepted by him, under the belief that the grantors in those deeds had title to the lands which they professed to convey. The bill does not allege the existence of any mistake. The averment is, fraud, not mistake. But would a mistake of this character, even if charged in the bill, in which both parties participated, and by which both were injured, in the absence of all fraudulent misrepresentation or concealment on the part of *Barrick* and *Himes*, entitle the complainant to the relief which he has sought, or authorise this court to vacate the contract? In our opinion it would not.

It is to be noticed, that whatever may have been the belief of the parties when the conveyances in question were delivered and accepted, as to the title of the grantors to the lands embraced by them, there is no evidence that *Barrick* and *Himes*, at the time of the contract, made any representation or affirmation upon this subject. In this case the contract was executed, on the part of the defendants, by the conveyances for the *Illinois* lands, and on the part of the complainant, by an assignment to *Barrick* and *Himes*, of the whole of his interest in the *Washington* county estate, and by the delivery of the possession of it to the defendants, under and by virtue of the contract and assignment. It was the duty of *Middlekauff*, to have investigated the title of the grantors to the lands which they professed to convey; or he might have guarded himself against injury by appropriate covenants. Having done neither, the loss to which he is subjected, and of which he complains, is the consequence of his own supineness. Upon this subject, *Mr. Sugden*, says, in his treatise on vendors: "With the exception of a vendor or his agent suppressing a defect in the title, it is clear, that a purchaser cannot obtain relief against any defect in the title to which his covenants do not extend, and therefore if a purchaser neglect to have the title investiga-

Middlekauff vs. Barrick, et al.—1846.

ted, or his counsel overlook any defect in it, he is without remedy." 1 *Sug. on Ven.*, 7, sec. 29. Again, 1 *Sug. on Ven.*, 286, sec. 25: "Generally speaking, a purchaser after a conveyance, has no remedy except upon the covenants he has obtained, although evicted for want of title, and however fatal the defect may be, if there is no fraudulent concealment, the purchaser's only remedy is under the covenants." *Ib.*, 283, 284. 2 *Wans.*, 287, as cited in 1 *Sug.*, 284. *Urmston vs. Pate*, cited 2 *Sug.*, 283.

The ground on which a court of equity interposes, in a case like this, is misrepresentation or concealment. This, we think, the complainant has failed to establish, and his bill must therefore be dismissed, with costs.

The complainant appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MAGRUDER, J.

By JERVIS SPENCER for the appellant,

MAGRUDER, J., delivered the opinion of this court.

For mistake or misrepresentation of matters of fact, contracts and conveyances may sometimes be set aside by courts of equity. Every mistake of facts, however, will not give the purchaser a right to ask, that his contract be annulled. See *1st Story's Reports*, 172. *1st Story's Equity Jurisprudence*, sections 150, 151.

The cases cited by the court below, clearly establish, that if the purchaser has taken a conveyance, and there be no fraud, he has no remedy, although he be evicted for want of title: except upon the covenants in his deed. See, also, 5 *Johns. Chan. Reps.*, 79. 2 *J. C. R.*, 519.

In this case, fraud is expressly denied, and there is no proof that any was committed. The complainant, therefore, can have no title to relief.

There is another objection to the relief which he seeks. The lands purchased by him are situate in the State of *Illinois*, and the title to them, (such as the parties granting, could give him,) is in the complainant; we cannot conclude

Bell vs. The State, use of Miller.—1846.

that this title is valueless, especially in a suit to which the grantors in the deed are not parties, and to give the relief which is asked, would be to cancel the contract between these parties, only so far as it relates to the lands in *Washington* county, and thus restore to the complainant such title to those lands, as was transferred to him, while he retains the title to the lands in *Illinois*, and a right to sue on the covenants contained in the deeds to him.

But, for the reasons assigned by the court below, no relief can be had in this case.

DECREE AFFIRMED.

DAVID BELL vs. THE STATE OF MARYLAND, USE OF WILLIAM MILLER.—*December* 1846.

A party in custody, upon a writ of *ca. sa.*, issued upon a judgment rendered by a justice of the peace, upon a subject matter within his jurisdiction, cannot be discharged from such custody upon a writ of *Habeas Corpus*.

An appeal from a judgment of the county court, overruling a motion for a discharge from custody upon the return of a *Habeas Corpus*, is not an appeal from a judgment or determination of that court, in a civil suit or action within the contemplation of the act of 1785, ch. 87.

The writ of *Habeas Corpus*, is a proceeding summary in its character, addressed to the discretion of the judge or tribunal, to whom application for it is made, so far as the discharge of the party is concerned. It is not final and conclusive upon such party.

Imprisonment under a judgment, cannot be unlawful, unless that judgment be an absolute nullity.

Where the judgment on which an execution has been issued, is merely erroneous, and liable to be examined upon appeal from it, the writ of *Habeas Corpus* cannot be applied.

APPEAL from *Washington* county court.

On the 21st May 1846, the appellant filed his petition, alleging, that he was illegally detained in jail, praying that the cause of his detention might be examined into, and he discharged from prison.

On the same day, the court, (BUCHANAN, A. J.,) ordered a writ of *Habeas Corpus* to issue. Upon the return of the writ,

Bell vs. The State, use of Miller.—1846.

Bell moved for his discharge from custody, and the parties agreed upon the following statement:

“*Etnyre* and *Besore* recovered a judgment before *William H. Boyd, Esq.*, a magistrate, against the prisoner, *David Bell*; said judgment was superseded by a certain *William Miller*. When the judgment became due, *Geo. W. Smith*, as agent for *Etnyre* and *Besore*, ordered the said *Boyd* to issue a *ca. sa.* against *Bell* and *Miller*, which was placed in the hands of a constable; *Bell* was taken by virtue of said *ca. sa.*, and committed to jail, and *Miller* was returned *non est*, although living in *Hagerstown*. After the commitment of *Bell, Miller*, at the suggestion of the said *Geo. W. Smith*, placed in the hands of the said *Geo. W. Smith*, the amount of said judgment, with directions that the same should not be paid over to the constable, until *Bell* should be discharged under the insolvent laws of *Maryland*, in order that said payment might create a new debt against *Bell* in favor of *Miller*. After *Bell* had been confined for nearly two weeks in the county jail, he petitioned, to wit, on the 14th day of May 1846, one of the judges of the orphans court of *W. county*, for the benefit of the insolvent laws, and was on the same day discharged from custody. Immediately after his discharge, he was arrested by a constable, under a warrant issued by the said *Boyd*, upon a claim in favor of the constable, who was acting in the collection of the debt of the said *Etnyre* and *Besore*, against the said *Bell* and *Miller*, and taken to the office of the said *Boyd*. On reaching the office, the same was found closed, and while the prisoner was there remaining in the custody of the officer by whom he had been arrested, the aforesaid *Geo. W. Smith* paid over to the said constable the money which had been deposited with him, as aforesaid, by the said *Miller*. Thereupon the said *Smith*, as the agent of the said *Miller*, ordered a warrant against the said *Bell* for the amount thus paid, which warrant was issued by the said *Boyd*, at some place other than at his office. As soon as the last named warrant had been issued, the said *Boyd* repaired to his office to receive the return of the other constable in the case, in favor of *Thos. E. Schleigh*, the first constable. The said *Schleigh*

Bell vs. The State, use of Miller.—1846.

thereupon abandoned his claim against *Bell*, and arrested him upon the warrant in favor of *Miller*, which was returnable two days thereafter. Good security was offered to the constable, *Schleigh*, for the appearance of *Bell* on the return day of the warrant, which was refused, and the prisoner was committed to jail. At the time of the trial, the prisoner pleaded his personal discharge under the aforesaid insolvent laws, but the justice refused the same, and rendered an absolute judgment for the money, upon which judgment the said *Bell* was committed to prison. It is admitted, that the money was paid by *Miller*, in the manner above described, about ten or fifteen minutes after *Bell's* discharge, but upon the same day. It is further admitted, that the said *Geo. W. Smith* is not an attorney or counsellor to practice law."

The county court overruled the motion of the appellant for his discharge, and he prosecuted this appeal.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By MASON and TIDBALL for the appellant, and
By MURRAY for the appellee.

MARTIN, J., delivered the opinion of this court.

This case comes before this court, by an appeal from an order passed by *Washington* county court, dismissing the application of the appellant to be discharged from imprisonment, on a writ of *Habeas Corpus*, and remanding him to the custody of the sheriff.

It appears from the record, that the appellant was in the custody of the sheriff, under a *Capias ad Satisfaciendum*, issued on a judgment which had been rendered against him, by a justice of the peace for *Washington* county, in favor of *William Miller*. The cause of action, on which the judgment was rendered, arose out of a debt paid by *Miller*, as the security of the appellant, on the day on which he was released from imprisonment by the insolvent laws of the State; and which, *Miller* contended, was not covered by the insolvent's discharge.

Bell vs. The State, use of Miller.—1846.

In this condition of the case, the first question presented for our examination, is, whether an order of this kind, is the subject of an appeal to this court?

The counsel for the appellant have placed his right to appeal from this order, on the sixth section of the act of Assembly, of 1785, chap. 87, and the act of 1804, chap. 55, by which the powers of the *General Court* are transferred to the Court of Appeals. The act provides:—"That any party or parties aggrieved by any judgment or determination of any county court, in any civil suit or action, or any prosecution for the recovery of any penalty, fine or damages, shall have full power and right to appeal from such judgment, or determination, to the *General Court*."

It is clear, we think, that the order of a county court dismissing the application of the petitioner to be discharged from custody, on a writ of *Habeas Corpus*, is not a determination or judgment of the court, in a civil suit or action, in the contemplation of the act of 1785, chap. 87; so as to authorise an appeal.

The writ of *Habeas Corpus*, although a most important and valuable remedy, and brings up the body of the party, with the grounds on which he has been deprived of his liberty, for the examination of the court:—is a proceeding, summary in its character, addressed to the discretion of the judge, or tribunal, to whom the application is made, so far as the discharge of the party is concerned;—a proceeding where, in many cases, the evidence upon which the judgment is founded, cannot be presented to the appellate court, and is not final and conclusive upon the party applying for the writ; as he may prefer a similar application, to any other judge or court of the State. An order, therefore, dismissing such a petition, has none of the characteristics of those judgments, which have been regarded by this court as proper subjects for an appeal.

We think, however, if this was a subject of review, that the court below committed no error, in remanding the appellant to the custody of the officer, and dismissing the petition.

It is apparent, from the statement of facts, to be found in the record, that the judgment of the justice of the peace, rendered

Bell vs. The State, use of Miller.—1846.

in this case, was not a void judgment. The magistrate had undoubted jurisdiction, both of the parties and the subject matter of the suit, and if this judgment was erroneous, the mode in which it was to be corrected, was by an appeal to the county court, as prescribed by the act of Assembly. It cannot be held, that the court, upon this writ, had the power to look beyond the judgment, and re-examine the grounds on which it was rendered, and practically reverse it. 3 *Pet.*, 202. Imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous. 3 *Pet.* 203.

Although the right to the writ of *Habeas Corpus*, in many civil causes, as in the domestic relations of husband and wife, and parent and child, is unquestionable;—yet the power to use this writ, for the purpose of discharging a party from final civil process, has been questioned by very distinguished authority. *Ex-parte, Wilson*, 6 *Cran.*, 52. *Cable vs. Cooper*, 15 *John.*, 152.

However this may be, and in reference to this question we desire to express no opinion, it is established, and upon the most conclusive reasons, that where the judgment upon which the execution has been issued, is merely erroneous, and liable to be examined, by an appeal from it, the writ of *Habeas Corpus* cannot be applied.

In *Ex-parte, Kellogg*, 6 *Vt. R.*, 511, the court say:—“*Habeas Corpus*, is not a proceeding to set aside an irregular or an erroneous judgment. To discharge the prisoner, would deprive the creditor of the power of enforcing his judgment, and, at the same time, leave it in full force, unreversed. The execution is only to be treated as void, when the judgment is void. This is never the case, when the court has jurisdiction of the subject matter, and the parties; especially, if the defendant has had actual and timely notice.”

In *Ex-parte, Randolph*, 2 *Brock.*, 472, judge *Barbour* remarks:—“*Habeas Corpus* will not lie, where imprisonment is under voidable process; but only where it is merely void: for void process is the same thing as if there were none at all; and

Schleigh and Kershner, vs. Hagerstown Bank.—1846.

the party is, in effect, imprisoned, without any authority whatever." And after distinguishing the cases of *Ex-parte, Wilson*, and *Cable against Cooper*, from the one before him, on the ground, that in those cases the judgments were re-examinable by writs of error, he holds: That in cases where the execution, if it does not conform to the judgment, may be quashed by the court; and if it does, and the judgment is erroneous, it can be corrected in a court of appellate jurisdiction, the writ of *Habeas Corpus* will not lie.

The same doctrine is announced in *Ex-parte, Watkins*, 3 *Pet.*, 193, and fully sustains the judgment of the court below.

APPEAL DISMISSED WITH COSTS.

JOHN SCHLEIGH AND JONATHAN KERSHNER, vs. THE HAGERSTOWN BANK.—*December* 1846.

At the return term of the writ, in November, as shown by the docket entries, the defendant gave special bail, appeared, and the cause was continued to the March term, under a rule to plead. The rule-days to plead were the first Mondays of March and November. The declaration was filed on the first Monday of February. Before the March rule-day, the defendant's counsel called at the clerk's office, examined the papers of the cause, and remarked, there was yet time enough to plead limitations. At the March term, the defendant obtained a rule nisi, to strike out the bail and appearance, upon the ground, that they had been erroneously entered, as he had not offered bail, nor appeared to the cause. The county court discharged the rule, and no motion being made, or plea offered, by the defendant, entered up judgment upon the cause of action, a promissory note of the defendants. **HELD**, that the defendant, under the circumstances, had recognized the entry of bail and appearance, and as he was not precluded from pleading to the merits, the rule was properly discharged.

It was the duty of the defendant to have appeared at the return of the writ, and to enforce the rule, would be to let the amercement against the sheriff stand, and enable the defendant to plead limitations. The refusal of the rule, deprived the defendant of no meritorious defence.

Under the act of 1825, ch. 117, this court cannot reverse the judgment of the county court, except upon a point decided by the court below, and as no motion was made to that court in relation to it, nor its attention called thereto, no question affecting it is open here for review, even if it were erroneous.

Schleigh and Kershner, vs. Hagerstown Bank.—1846.

APPEAL from *Washington* county court.

This was an action of *assumpsit*, commenced on the 12th November 1844, by the appellee against the appellants and *David Showman*. The latter was not taken. The other defendants appeared by attorney, at November term 1846.

The plaintiff declared upon the following note :

“\$661.68. WASHINGTON COUNTY, Oct. 1st, 1839.

Sixty days after date, we, or either of us, promise to pay to the *President, Directors and Company of the Hagerstown Bank*, or order, for value received, six hundred and sixty-one dollars, sixty-eight cents, negotiable at said bank, and payable at the house of *William M. Marshall, Hagerstown*.

D. SHOWMAN,
JOHN SCHLEIGH,
JONATHAN KERSHNER.”

Several credits on account of the note were endorsed upon it, and the defendants were ruled to answer the declaration.

At the same term, March term 1845, the defendant, *Jonathan Kershner*, suggested to the court, that at November term 1844, the defendant made enquiry of *Isaac Nesbitt*, then principal deputy clerk of said county court, about a case of the *Hagerstown Bank* against him, and that said *Nesbitt* replied, that there was no such case; but notwithstanding, from inadvertance or misapprehension of the law, or from some mistake, the principal deputy clerk entered an appearance of an attorney of the said county court for the said *Jonathan Kershner*, in the above cause, together with *John Schleigh*, the other defendant above named, and also entered *Thomas E. Schley*, as special bail for the said defendant, *J. K.*, together with the said *John Schleigh*, the other defendant above named, the said *T. E. S.* not having intended or offered to enter special bail, as aforesaid, for the said *J. K.*; and the said *J. K.* further suggests, that the attorney, *Alexander Neill, Jr.*, whose appearance was entered as aforesaid, was not spoken to by the said *J. K.*, for that purpose, and did not offer or intend to enter his appearance for the said *J. K.*; and it further appearing satisfactorily to the court here, by the affidavit of *George A. Bender*, that the said *J. K.* made enquiry of *I. N.*, the princi-

Schleigh and Kershner, vs. Hagerstown Bank.—1846.

pal deputy clerk of *W.* county court, during the said November term 1844, about a case of the *H. B.* against him, and the said *N.* replied, that there was no such case; and it further appearing satisfactorily to the court here, by the affidavit of *T. E. S.*, that he did not offer or intend to become special bail, as aforesaid, for the said *J. K.*; and it also further satisfactorily appearing to the court here, by the affidavit of the said *Alexander Neill, Jr., Esq.*, that the said *A. N., Jr.*, did not offer or intend to enter his appearance as attorney for the said *J. K.*

It was thereupon, on motion of the said *J. K.*, defendant, as aforesaid, by his attorney, *R. M. Tidball*, ruled, that the said plaintiffs shew cause by the —, why the docket entry or entries, by which it appears that an entry or entries, of an attorney and special bail for the said *J. K.*, should not be corrected, so as to make the said docket entry or entries, conform to the truth of the case.

At the same time, the affidavits referred to were filed.

“*WASHINGTON COUNTY, sct.* On this 9th April 1845, before me, &c., personally appears *George A. Bender*, and made oath, that during November term 1844, of *W.* county court, he entered special bail for *J. K.* in two cases, and said *K.* made enquiry of *I. N.*, then a deputy clerk of *Washington* county court, about a case of the *Hagerstown Bank* against him, and that said *Nesbitt* replied, there was no such case. Sworn before,” &c.

“*W. COUNTY, sct.* On this 9th April 1845, before, &c., personally appeared *T. E. S.*, and made oath, that during November term 1844, of, &c., he entered special bail for *J. S.*, at the suit of the *Hagerstown Bank*, but did not offer or intend to enter special bail for *J. K.*, never having been requested by said *Kershner* to do so. Sworn before,” &c.

“*W. COUNTY, sct.* On this 9th day of April 1845, personally appeared in open court *Alexander Neill, Jr.*, attorney of *Washington* county court, and made oath, that he did not, at November term 1844, nor at any time since, offer to enter his appearance as attorney for *J. K.*, and that he did not, during that time, nor at any time since, authorise his name, as attorney, to be so entered,” &c.

Schleigh and Kershner, vs. Hagerstown Bank.—1846.

“*W. COUNTY, to wit.* On this 12th day of April 1845, personally appeared in open court *John D. Ridenour*, a deputy sheriff of said county, and made oath, that he spoke to *J. S.*, or sent word to him, one of the defendants, at the suit of the *H. B.*, to procure special bail, to be entered at November term 1844, of *W.* county court; that he does not recollect that he did, nor does he believe that he spoke to *J. K.*, another of the defendants, on the subject of entering special bail in the said case.”

The *Hagerstown Bank* also filed the affidavit of *Isaac Nesbitt*, to wit:

“Be it remembered, that before me, the subscriber, one of the justices, &c., personally appears *Isaac Nesbitt*, and being first duly sworn, deposes and says, that during the sitting of said court, at its last November term, a certain *T. E. S.* appeared in open court, and offered to become special bail for *J. S.*, one of the above named defendants in said suit; but, at the suggestion of this deponent, he, the said *T. E. S.*, consented to become, and did become, the special bail of both said defendants in said case, as this deponent believes, and as the record shows; and that if he had become the special bail of but one of said defendants, as is alleged, it would have been so specifically entered. And this deponent further makes oath, that some time after the close of the November term aforesaid, and before the first Monday of March then next, *Robert M. Tidball, Esq.*, came into the clerk’s office, and asked to be shewn the papers in the above case, and after looking at them, and making enquiry as to the rule-day for filing pleas, he handed the papers back to this deponent, or laid them down, remarking, that there was yet time enough, and left the office. That after the lapse of some further time, *Mr. Tidball* came again into the clerk’s office, and asked for the same papers, stating at the time his intentions to file a plea of the statute of limitations in this case for *Mr. Kershner*, when this deponent suggested to him, that the rule day for filing pleas had passed, it being then after the said first Monday of March, and showed him the rules of court, of which he made some complaint about their having been changed. That in this case, the nar

Schleigh and Kershner, vs. Hagerstown Bank.—1846.

was filed on the first Monday of February, and that the rule-day for pleas, was the first Monday of March; and that said *Tidball* was shown the papers in this case, as above stated, before the first Monday of March. And this deponent also remembers, that *G. A. B.*, one of the deponents in this case, appeared in court, at the said November term, and offered to become the special bail of *J. K.*, at the suit of the *H. B.*, but owing to the fact, that the case was not found on the index against *K.*, and forgetting at the moment the existence of this case, deponent replied, as well as he remembers, that there was no such case on the docket; and further this deponent saith not."

The rule of court, mentioned and referred to in the affidavit last aforesaid, is as follows:

"In all cases where declarations are sent with the writs, or filed within the first three days of the term to which they are returnable, the rule-days to plead, shall be the first Mondays of February and October, next following the terms to which the writs were returned served; and in all cases where the declarations are not filed, as aforesaid, the rule-days for filing the declarations in said cases, shall also be on the first Mondays of February and October next following; the terms to which the writs were returned served, and the rule-days to plead to declarations filed, as last aforesaid, shall be the first Mondays of March and November following."

At the same term, the defendants not having pleaded to the declaration, and the county court having considered the suggestion of the defendant, *J. K.*, and the affidavits respectively filed in relation thereto, rendered judgment for the plaintiffs on the note aforesaid.

The defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MAGRUDER, J.

By *TIDBALL* and *SCHLEY* for the appellants, and
By *ROMAN* for the appellees.

Schleigh and Kershner, vs. Hagerstown Bank.—1846.

ARCHER, C. J., delivered the opinion of this court.

In the court below, application was made by the defendant, *Kershner*, at the trial term, to strike out the entry of special bail and appearance, for him, upon the ground, that the special bail was for *Schleigh* alone, and that the defendant, *Kershner*, had not given bail, in point of fact, or authorised an attorney to appear for him.

The declaration had been filed, and by the rules of *Washington* county court, the rule-day to plead had passed; but it was in the power of the defendant, to have pleaded to the merits of the case.

The motion to rectify the proceedings, is not on behalf of the bail, but on behalf of the defendant, who alleges, that the special bail, and the appearance of an attorney, have been entered for him, without his authority; and he insists, that he possesses the right, to have the entries of bail and appearance stricken out.

The consequences arising from a gratification of the defendant's motion, would be an amercement of the sheriff for his failure to appear; and if he did afterwards appear, to let him in to plead any plea to the action, whether to the merits or not. The injury he has sustained, if the facts be true, is, that he is precluded from pleading any dilatory plea; or any plea which is not to the merits of the action. But nothing had occurred at the time of the motion, which prevented him from pleading, whatever plea he might choose to plead, to the merits of the action.

No doubt, on the application of the proper party, and at the proper time, mistakes may be corrected; but it would be a dangerous exercise of power, to apply the principle to every case which might be presented. It would, no doubt, have been competent for the defendant, *Kershner*, notwithstanding the alleged mistake, subsequently, so far as he was concerned, to have sanctioned the entry of special bail; and we think he has done so in this case. Before the expiration of the rule-day, his attorney examined the papers in the cause, enquired of the clerk as to the rule-day for filing pleas, and receiving the information, remarked, it was yet time enough; and again,

Schleigh and Kershner, vs. Hagerstown Bank.—1846.

afterwards, asking the clerk for the same papers, declared his intention to file the plea of limitations. In this there is a full recognition, that bail had been properly entered, or there would have existed no right to plead to the action.

To this portion of the evidence we are disposed to give the greater weight in the case before us, because it was the duty of the defendant to have appeared at the return of the writ, and to have entered bail and appearance; because the gratification of his motion would occasion the amercement of the sheriff; would enable him to plead otherwise than to the merits of the case; and because, by the refusal of his motion, he could have been deprived of no meritorious defence.

It is apparent from the evidence, that the defendant had an opportunity to have availed himself of the plea of limitations, notwithstanding these entries. He knew that bail and appearance had been entered for him before the rule-day, as his attorney examined the papers before the rule-day; and if with this knowledge he has failed to avail himself of rights entirely within his power, and of which he has in no manner been deprived by the entries, of which he complains, he cannot expect the aid of this court, to relieve him from the consequences of his own supineness.

At March term 1845, this cause stood regularly for trial, and was under rule-plea, when the rule to shew cause, above referred to, was laid; and on discharging the rule to shew cause, judgment, as for want of a plea, in the then state of the record, would have been properly rendered. That the judgment has not assumed the form of a judgment, *nil dicit*, is no doubt a clerical error. But whatever may be the character of the error in the judgment, as no motion was made to the court, or its attention in any manner called to the subject, we could not reverse the judgment: the act of 1825, chap. 117, prohibiting the reversal of any judgment, except upon a point decided by the court below. *Sasser and Walker's Exs.*, 5 G. & J., 102. *Boarman vs. Israel and Patterson's Ex.*, 1 Gill, 381. We therefore affirm the judgment of the court below.

JUDGMENT AFFIRMED.

Trundle vs. Williams.—1846.

PERRY L. AND HORATIO TRUNDLE, vs. JOHN M. WILLIAMS,
ADM. OF OVERTON WILLIAMS, USE OF JOHN M. WIL-
LIAMS.—*December* 1846.

The plaintiff declared on a single bill of the defendant, who pleaded payment specially to have been made at certain times, and in certain amounts, on which plea issue was joined. The defendant proved his plea by the production of various receipts of the plaintiff. The plaintiff then proposed to prove, orally, that he had two bills for the same sum, and that the receipts were applicable to the note not sued upon. **HELD:** that he must produce that one, or account for its non-production; otherwise, the parol proof was inadmissible.

The best evidence of the existence, character, and contents of a written instrument, is the instrument itself.

APPEAL from *Montgomery* county court.

This was an action of *Debt*, commenced on the 30th October 1843, on the following single bill, of which oyer had been prayed.

“\$1000.—On or before the first day of January 1841, we jointly and severally, promise and oblige ourselves, our heirs, executors or administrators, to pay or cause to be paid to *Overton Williams*, his heirs or assigns, the just and full sum of one thousand dollars, current money of *Maryland*, with legal interest from date, being for value received; as witness our hands and seals this 1st March 1839.

PERRY L. TRUNDLE, (Seal.)
HORATIO TRUNDLE, (Seal.)
HEZEKIAH W. TRUNDLE, (Seal.)”

On the back of which said note were the following endorsements, viz :

“For value received, I hereby assign all my right, title and interest, claims and demands, of the within note, unto *John M. Williams*, this 6th day of April 1839, and guarantee the payment.
OVERTON WILLIAMS.”

“Interest paid on the within, by note, up to the first day of January 1842.—*J. M. W.*”

“20th September 1842.—By cash on the within note, one hundred dollars.—*J. M. W.*”

Trundle vs. Williams.—1846.

“20th September 1843.—By cash on the within note, two hundred dollars.—*J. M. W.*”

The defendants pleaded, that the said single bill was assigned for value received, on the 6th April 1839, by *Overton Williams* to *John M. Williams*, and the said *Perry L. Trundle* paid to the said *John M. Williams*, for whose use the said suit is brought, the sum of \$225, in part payment of the said single bill in the declaration mentioned, on the 24th February 1840, and the further sum of \$309.91, in part payment of said single bill, on the 27th July 1840; and that the said defendant, *Perry*, afterwards paid to the said *John M. Williams*, for whose use the said suit is brought, and to whom the said single bill was assigned before then, the interest on the said single bill, up to the 1st January 1842; and on the 20th September 1842, the said *Perry L. Trundle* paid to the said *John M. Williams*, the further sum of \$100; and on the 20th September 1843, the said *Perry* paid to the said *John*, the further sum of \$200; and this the said defendants are ready to verify; wherefore, &c.

The plaintiff replied, that the said defendants have not, nor have either of them, paid to said plaintiff the said sum of money, in manner and form as the said defendants above, in their pleading, have alleged, &c.

To this replication the defendants rejoined, that the said *Perry L. Trundle* paid to the said *John M. Williams*, for whose use the said action was brought, the said sum of money, in the bill obligatory in the said declaration, mentioned, in the manner and form as they, the said *Perry L.* and *Horatio Trundle*, above, in their plea had alleged; and of this they put themselves upon the country, &c. On which issue was joined.

The jury found a verdict for the plaintiff.

At the trial, the plaintiff offered in evidence to the jury, the single bill, and endorsements thereon.

The defendant, to support the issue joined on his part, having first proved them to be in the handwriting of the plaintiff, by a competent and credible witness, read in evidence to the jury the following receipts :

Trundle vs. Williams.—1846.

“February 4th, 1840.—Received of *P. L. T.*, \$225, in part payment on a note of hand, assigned to me from *O. W.*, for \$1000.

JOHN M. WILLIAMS.”

“Received this 27th July 1840, of *Mr. P. L. T.*, a check on the *Bank of Baltimore*, for 309.91, in part payment on a note of *O. W.*, use of *J. M. W.*, dated 1st March 1839.

JOHN M. WILLIAMS.”

“\$100.—Received this 20th September 1842, of *P. L. T.*, \$100, in part payment on a note of hand assigned to me from *O. W.*

JOHN M. WILLIAMS.”

“Sept. 20th 1843, then received of *P. L. T.*, \$200, in part on a note of hand for \$1000, dated 1st March 1839.

JOHN M. WILLIAMS.

Ass'd from *O. Williams.*”

Before reading the two last receipts to the jury, by the defendants, the plaintiff offered to admit them as being the same that were credited on the foregoing single bill, coupled with certain qualifications; which admissions, as qualified, the defendants declined, and refused to receive, and gave the said receipts in evidence to the jury.

The plaintiff, further to support the issue joined on his part, having first offered to prove them to be in the handwriting of the said defendant, *P. L. T.*, gave in evidence to the jury the following letters, to wit :—

“JUNE 25th, 1840.

Dear Sir :—I have not sold my tobacco yet, and in consequence of that, I have not got you any money yet. I wrote to *Mr. Star* of *Baltimore*, yesterday, to sell, so I expect to get the money sometime this week; and if I do, I will bring it to you directly. Your's with esteem, PERRY L. TRUNDLE.

Mr. John M. Williams.”

“*Dear Sir* :—I shall try my best to get the money that I owe you. I am going to send my corn to town the next trip that *Mr. Conly* makes, that will be about to-morrow week. I saw *Hezekiah*, Sunday, and he had not any money at all. I will go again to-morrow morning to see him. If I can possibly get any money in the neighborhood, I will get it for you. You shall not suffer by me, if I can possibly help it. You have

Trundle vs. Williams.—1846.

waited longer than I could expect, and I am very much obliged to you for waiting as long as you have.

Yours respectfully, PERRY L. TRUNDLE.

Mr. *John M. Williams*, April 1st, 1840."

And the said plaintiff also offered evidence to the jury, to prove that the defendants, at the time the aforesaid single bill, the present cause of action, was given, executed another note or single bill, to the said *Overton Williams*, the intestate of the plaintiff; that the witness, *Fielder Darnell*, was present with the defendants, and the said *Overton Williams*, from whom the defendant, *Perry L. Trundle*, was about to purchase the land, for which the present cause of action was given, when the witness was asked, if he would write two notes, at one and two years, for the deferred payments of the land; that the witness declined, but said his brother *Thomas* would do it, and left the room. That soon after, the witness returned, and saw his brother *Thomas* writing at a table. Whereupon the defendants objected to the admissibility of any testimony, shewing the existence of notes, given by the defendants to the said *Overton Williams*, or the plaintiff, *John M. Williams*, other than the notes or single bills themselves, without first laying a proper foundation for the introduction of such testimony; and accounting for the absence of the notes spoken of; but the court, (WILKINSON and BREWER, A. J.,) overruled the defendant's objections, and permitted the said testimony to go to the jury. The defendants excepted to the opinion and direction of the court to the jury, admitting the testimony hereinbefore objected to. The plaintiff appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By R. J. BOWIE and T. S. ALEXANDER for the appellants.
By J. BREWER for the appellee.

DORSEY, J., delivered the opinion of this court.

The cause of action, in this case, was a note of hand or single bill, for \$1000, drawn by the appellants in favor of *Overton Williams*, the nominal plaintiff, by whom, in about one

month after its date, it was assigned to *John M. Williams*, the *cestui que use*. To the declaration of the plaintiff below, the defendants pleaded specially, certain payments, specifying dates and amounts, which they alleged they had made to *John M. Williams*, on account of the single bill, long after its assignment to him. These payments being distinctly put in issue in the pleadings in the cause, on the trial, the plaintiff having given in evidence to the jury the note with the assignment thereon, the defendants gave in evidence the receipts of *John M. Williams* for the disputed payments: which receipts stated the payments, for which they were given, to have been made on account of a note assigned by *Overton Williams* to *John M. Williams*. The plaintiff, then, without producing the note; or accounting for its non-production; or laying any foundation for the introduction of secondary evidence in proof of its contents; offered oral testimony to prove, that the defendants, at the time they gave the note already in evidence, had given to *Overton Williams* another note for the payment of money. The object of which oral testimony was to induce the jury to believe, that the disputed payments, insisted on in the defendants' plea, were made on the latter note; and not that on which the present action was instituted. To the admissibility of this oral evidence the defendants objected; but the county court overruled the objection, and permitted the testimony to go to the jury. In doing so we think the court were in error. The best evidence, of the existence, character, and contents, of a written instrument, is the instrument itself. Whether there were two notes, for the payment of money, given by the defendants to *Overton Williams*, is a question, which ought to be determined, by the production of the notes. As administrator of *Overton Williams*, and *cestui que use* in this cause, they are presumed to be in the possession of *John M. Williams*, and for their non-production, he has shewn no cause. If the note, of which oral testimony was offered, had been paid up, and delivered to the defendants, proof thereof should have been adduced; and a notice, to produce it at the trial, served upon the defendants. Of the hardship of his case, in this respect, the plaintiff had no cause to complain. He was

Parker vs. Sedwick.—1846.

not taken by surprise. The necessity of producing the testimony he offered, was not for the first time made known to him by the evidence on the part of the defendants. The payments, asserted in the pleadings of the defendants, were made to him; he of course knew to what note or account they were intended to be applied; and to have come prepared, with competent testimony, to resist the defence set up against him, was his most obvious duty.

The judgment of the county court is reversed, and a *procedendo* awarded.

JUDGMENT REVERSED.

STAFFORD H. PARKER, vs. JAMES C. SEDWICK.—Dec. 1846.

On or about the day on which a foreign commission was sent off, to take evidence out of the State, the plaintiff, upon whose motion it was granted, did not file in court, but served a copy of his interrogatories on the defendant. This is not such reasonable notice, as would give the defendant time to exhibit his cross-interrogatories, before the transmission of the commission. In such a case, the plaintiff ought to show affirmatively, that the defendant had reasonable time from the service of the notice, to the time when the commission was sent out, to have filed cross-interrogatories, if he desired it. Otherwise, the proceedings under such a commission, cannot be read to the jury.

The service of notice of interrogatories on the opposite party, in the execution of a foreign commission, is to accomplish the same end, as notice of the time and place of executing a domestic commission would.

If evidence be inadmissible on any ground, when objected to as inadmissible, it ought not to be received; and in reviewing such an objection, this court is not confined to the erroneous reasons of the county court, for rejecting it.

Under the act of 1830, chap. 186, where judgment of the county court rendered upon exceptions, affirmed by the Court of Appeals, would not be a bar to another action by the same plaintiff against the same defendant, by reason of a variance, which the plaintiff might cure by amendment, if permitted, and having merits, this court will award a *procedendo* and a new trial.

APPEAL from *Calvert* county court.

This was an action of *Debt*, commenced on the 1st June 1841, by the appellant against the appellee, for the sum of \$1054.57.

Parker vs. Sedwick.—1846.

The plaintiff declared: "for that at a *Circuit Superior Court*, &c., for the *State of Virginia*, held on the 29th December 1840, the justices of *Caroline* county court, in *Virginia*, at the instance, and for the benefit of a certain *Charles S. Jones*, by the judgment of the said court, recovered against the said *S. H. P.*, one of the securities of the said *J. C. S.*, as administrator of *Dr. Benjamin Sedwick*, as well the sum of \$2000, for his damages, to be released on the payment of \$1054.57, which he had sustained by reason of the non-performance of certain promises and assumptions, to the said relators, by the said *J. C. S.*, as administrator, &c., before that time made, as also his proper costs, &c., whereof the said *S. H. P.*, as surety, is convict, as aforesaid, as appears, &c., which said sum of money has been fully paid and satisfied by the said *S. H. P.*, as surety aforesaid, whereby an action hath accrued to the said plaintiff, to have and demand, of and from the said *J. C. S.*, the said sum of money above demanded, being the amount of the damages, costs and charges aforesaid, &c., recovered Nevertheless he hath not paid, to the damage of the said *S. H. P.*, \$2000," &c.

The defendant pleaded:—

1. *Nil debet.*
2. Limitations.
3. Payment to *S. H. P.*

To these pleas the plaintiff replied generally.

At the trial of the cause, the plaintiff read in evidence the record of a decree recovered by *Charles S. Jones*, against the present defendant, *James C. Sedwick*, administrator of *Benjamin Sedwick*, in a superior court of law and equity of the State of *Virginia*. And then offered to read a commission to take evidence, and proceedings under it.

The defendant objected to the reading of said commission, on the ground, that he had no notice of the time and place, and mode, of executing the same.

The plaintiff then proved, that his interrogatories were filed with the clerk of this court the 9th of September 1844, and that the commission, with a copy of his interrogatories, were enclosed together, and sent by mail to the commissioner therein

Parker vs. Sedwick.—1846.

named; that the said commission and copy of interrogatories, with the other proceedings, were returned to the clerk's office in one enclosure; that on or about the 9th of September 1844, and before the commission was sent to the commissioner, as aforesaid, a copy of said interrogatories was served on *Augustus R. Sollers, Esq.*, one of the attorneys for the defendant, residing at or near *Prince Frederick* town. On the part of the defendant, it was proved, that the said counsel, at the time of receiving such copy, stated to the plaintiff's counsel, that he wanted time to prepare his cross-interrogatories, and to consult *A. Randall, Esq.*, the associate counsel for the defendant, about them, and that the said counsel for the defendant said, at the trial, that he either notified *Mr. Randall* of the fact, that the said copy of the commission and interrogatories had been served upon him, the witness, or that he intended so to do, and very probably forgot it; and that he heard no more of the commission or interrogatories, until after they had been sent to *Virginia*, and had been returned here. But it was further proved, that no cross-interrogatories were, at any time, filed in said court. On this proof, this plaintiff insisted, that the said commission and the proceedings thereon, were admissible in evidence; but the court, (*DORSEY, C. J.*, and *WILKINSON, A. J.*) excluded them, on the aforesaid objection; to which exclusion the plaintiff excepted.

The plaintiff then moved to set aside the verdict, and that a new trial might be had, on the ground, that the verdict was rendered in consequence of the rejection of evidence of the commission and proceedings thereunder, which are more particularly stated in the exception taken in this cause; the plaintiff insisting, that he relied on such commission and proceedings, as proper, competent, and sufficient evidence, in the cause; and that the objection taken to the same, at the trial of the cause, operated as a surprise upon him. That under all the circumstances detailed in the bill of exceptions, before stated, he ought to have an opportunity of submitting his case to another jury. This motion the county court overruled.

The plaintiff appealed to this court.

Parker vs. Sedwick.—1846.

The cause was argued before ARCHER, C. J., SPENCE, MARTIN and MAGRUDER, J.

By N. BREWER, OF JOHN, and T. S. ALEXANDER, for the appellants, and

By RANDALL for the appellee.

SPENCE, J., delivered the opinion of this court.

In this case, on motion of plaintiff's counsel, leave was granted by the court, with consent of counsel, to issue a commission to *William S. Triplett*, of *Richmond, Virginia*, to take testimony. The commission was issued on the 5th day of June 1844.

At the trial of this cause, the plaintiff, to maintain the issues on his part, offered to read to the jury, the commission, and proceedings under it. The defendant objected, on the ground, that he had no notice of the time, place, and mode, of executing said commission; which objection the court sustained. "The plaintiff proved, that his interrogatories were filed with the clerk of the court, the 9th of September 1844; that the commission, with a copy of his interrogatories, were enclosed together, and sent by mail to the commissioner therein named. And that said commission and interrogatories, with the proceedings under the commission, were returned to the clerk's office. And further proved, that on or about the 9th of September 1844, and before the commission was sent to the commissioner aforesaid, a copy of said interrogatories was served on the defendant's counsel; who, at the time of the service, stated, that he wanted time to file cross-interrogatories."

This court has repeatedly decided, that, in the execution of a foreign commission, no notice of the time and place of its execution was requisite. *Calvert vs. Cox*, 1 Gill, 119. We should have supposed, but for the statement in the exception, that this would not have been the ground on which the testimony was excluded.

This court in the case of *Calvert vs. Cox*, decided, that, in executing a foreign commission, "all the notice required, is that of the interrogatories sent out with the commission; actual

Parker vs. Sedwick.—1846.

or constructive notice, should be given to the opposite party in time for him to exhibit cross-interrogatories, before the transmission of the commission.”

In this case there was proof, that on or about the 9th of September 1844, and before the commission was sent to the commissioner, a copy of the plaintiff's interrogatories was served on the defendant's attorney.

If the service of notice of the interrogatories, on the opposite party, in the execution of a foreign commission, is to accomplish the same end, as notice of the time and place of executing a domestic commission, assuredly it must be a reasonable notice; and such time should be allowed, between the service of the notice and sending out the commission, as would enable the party notified, if he desired it, to file cross-interrogatories.

The evidence in this case, is, that the notice was served on the defendant's attorney, on or about the 9th of September 1844, and before the commission was sent to the commissioner; but whether one hour, one day, or one week, does not appear. The plaintiff, in this case, ought to have shewn affirmatively, that the defendant had reasonable time, from the service of the notice to the time when the commission was sent out, to have filed interrogatories, if he had desired it.

If the county court did reject this evidence, for a reason which this court deems erroneous, (as the record imports,) yet, inasmuch as there were legal grounds for its rejection, or in the language of this court, in *Sotheron vs. Weems*, 3 G. & J., 435: “If it be inadmissible on any ground, it should be rejected;” and therefore we affirm the judgment.

JUDGMENT AFFIRMED.

At the same term, after the affirmance, ALEXANDER, for the appellant, moved the court for a writ of *procedendo*, under the act of 1830, ch. 186.

That act declares, that in all cases of appeals brought by the *plaintiff* (below) upon a *bill of exceptions*, when the judgment excepted to *shall be affirmed*, and it shall appear to the Court of Appeals, that the substantial merits of the case are not determined by the said judgment, the said court shall and

may, in their discretion, direct their clerk to return the transcript to the court, which gave judgment, with a writ of *procedendo*, commanding a new trial, &c., and the county court shall proceed in such action, by *amendment of pleadings, or otherwise*, as now practised, &c., *provided* that nothing herein contained shall authorise the return of any transcript in any cause, *where the judgment of the Court of Appeals would be a bar to a new action upon the same cause.*

The counsel for the appellant said, it appeared from the commission which had been rejected, and which contained a record of the *Virginia* judgment, that on the 5th Oct. 1840, the justices of the county court of *Caroline* county, *Va.*, at the relation, and for the benefit of *Charles S. Jones*, had filed a declaration against the appellant and appellee in a plea of debt, suggesting a breach of a bond, which the said parties and another had given, for the performance of the duty of administrator of *Benjamin Sedwick*, deceased, by the appellee; and that *Jones*, by a decree of the *Circuit Superior Court of Spottsylvania*, rendered on the 6th September 1836, had recovered against the appellee here \$1054.40, with assets, which he had wasted. The action of the 5th October 1840, as respected *J. C. S.*, abated by his non-arrest. That *Parker* being arrested and not appearing, judgment was entered against him *nisi*, &c. That he afterwards appeared and pleaded: that on the 29th December 1840, verdict for \$1054.57, with interest from 26th September 1836, and judgment, were rendered against him, which he had paid.

The judgment of the 29th December 1840, is, “that the plaintiff, (the justices, &c.) for the benefit of the said *C. S. J.*, recover against the defendant, (*S. H. P.*), *two thousand dollars, the debt* in the said declaration mentioned, and their costs by them expended; and the said defendant in mercy, &c. But this judgment is to be discharged by the payment of the said \$1054.57, the damages assessed, as aforesaid, with interest thereon, as aforesaid, and the costs, and such other damages as may be hereafter assessed, upon a writ or writs of *scire facias* being sued out thereon, and new breaches assigned by any person or persons injured.”

Parker vs. Sedwick.—1846.

Now the declaration in this cause, describes a judgment recovered against the said *S. H. P.*, one of the sureties of *J. C. S.*, for “as well the sum of \$2000, *for his damages*, to be released on the payment of \$1054.57, current money, which they, (the justices,) had sustained by reason of the *non performance of certain promises and assumptions*, to the said relators, by the said *J. C. S.*, as administrator, before that time made, as also his proper costs; whereof the said *S. H. P.*, as surety aforesaid, is convict, as by reference to the record and proceedings will, &c., which said judgment, &c., hath been fully paid by the said *S. H. P.*, as surety,” &c.

It is clear, then, there is here a substantial variance. The *Virginia* judgment was rendered in an action of *debt*. The judgment is in debt for the penalty of the original administration bond, for \$2000. The terms of its release are stated. In the declaration in this cause, the judgment is pleaded upon, as if rendered in action of *assumpsit*. The sum of \$2000 is treated as damages, and the \$1054.57, parcel thereof, are alleged to be due for the non-performance of certain promises and assumptions.

Now, suppose the appellant were to commence a new action for money paid, laid out and expended, by him, for the use of the appellee, could the proceedings in this present action, though affirmed by this court, be relied upon as a bar? As soon as pleaded in bar, the plaintiff could show that the nature of the action was not the same. It would appear, that the money paid, and now claimed by the plaintiff, was not for a violation of promises and assumptions of *Sedwick* to the relators, &c., but for breach of the condition of a bond, covenanting to perform certain duties into which *Sedwick* and he had entered. Whether the form of action adopted in *Maryland*, was debt or *assumpsit*, the same variance would still appear. Moreover, in this action, the writ is in debt, while the declaration is, if any form at all, in *assumpsit*. The proceedings are most informally pleaded.

It is insisted, therefore, that by reason of the substantial variance in this cause from the proceedings in *Virginia*, as well as from the legal nature of the plaintiff's real demand,

Annan vs. Houek.—1846.

the judgment in this case would be no bar to another action for the plaintiff's claim.

I ask for a *procedendo*, *non obstante*, the affirmance, under the act of 1830, ch. 186. This court decides the cause upon a point not disclosed below. In effect, looking to all the facts, the judgment is a harsh one. It decides no merits, and naturally leads to more controversy, and all would desire that the merits might go to a jury for decision. The pleadings may be amended and justice done.

RANDALL, for the appellee, insisted, that the claim had no merits. It was a stale demand, originating in 1824, recently compromised by the plaintiff. The effect of the proof in the rejected commission, to which the court may look upon this motion, shows the plaintiff without merits. Under the act of 1830, it should appear affirmatively to the court, that the merits are with the plaintiff, or they will not award another trial, and so provoke controversy. This is, in truth, no more than an effort to renew the motion for a new trial, which was refused below.

The act of 1830, ought not to give more extended relief than the old *procedendo* acts. That writ was never granted, where it was seen the plaintiff could not recover. *Evans' Prac.*, 446. *Turner vs. Jenkins*, 1 *Har. & Gill*, 164.

By the COURT :—

Procedendo and a new trial awarded under the act of 1830, ch. 186.

ROBERT ANNAN vs. EZRA HOUEK.—December 1846.

A gave his promissory note to J, who endorsed it to H. In an action by H against A, he pleaded, that after the note was due, and before the commencement of the action, a period of about five months, and before the note was endorsed to H, J was indebted to him in a large sum, &c., for, &c., which exceeds the amount of the note and the damages sustained by H, which he, A, offers to set off, and allow to H to the full amount of such damages in bar, &c. HELD, upon general demurrer, that this plea was no bar to the action.

Annan vs. Houck.—1846.

A claim which the maker of a note has against the payee, not connected with it, cannot be set off in an action brought by an endorsee against the maker, though the note was endorsed after it fell due.

Any objection which may be taken against a note, may be taken against an endorsee thereof, if, when he took it, it appeared upon the face of it to have been dishonored.

A promissory note is certainly negotiable, as well after, as before it became due.

A set-off means a cross claim. One, therefore, upon which the defendant never could have sued the plaintiff, cannot be used as a set-off.

Courts will give a liberal construction to beneficial and remedial laws, but still it is the business of courts to declare, not make the law. So improvements in the law are to be accomplished by further legislation, not by misconstruction.

In an action upon a promissory note, in the name of the endorsee, *bona fide*, and for valuable consideration, a demand in favor of the maker against the endorser, is not admissible as a set-off, although the note may have been discredited when the endorser took it.

A set-off is confined to mutual debts between the plaintiff and defendant. It is a privilege unknown to the common law.

Courts of law, upon application to them, set off a judgment which the defendant has against the plaintiff, against another judgment which the latter has against the former.

APPEAL from *Frederick* county court.

This was an action of *assumpsit*, commenced on the 10th October 1843, by *Ezra Houck* against *Robert Annan*.

The plaintiff declared :

1st. "That whereas the said defendant, on the 30th September 1842, at, &c., made his certain promissory note in writing, bearing date the day and year aforesaid, by which said note the said defendant, six months after date, promised to pay *Z. Jodon*, or order, \$271.62, with interest from date, for value received, and alleged its delivery to the payee, and endorsement by him to *Ezra Houck*, &c.

2nd. For so much money, by the plaintiff lent and advanced to the defendant, at his special instance and request.

The defendant pleaded :

1st. *Non assumpsit*.

2nd. As to the said *first* count, that the said promissory note was endorsed and assigned to the said plaintiff by a certain *Zachariah Jodon*, the payee in the said note, after the said

Annan vs. Houck.—1846.

note was due, to wit, on the 10th April 1843, at, &c.; and the said *Zachariah Jodon*, before commencement of this suit, and before the said note was endorsed and assigned to the said plaintiff, by the said *Zachariah Jodon*, as aforesaid, to wit, &c., was indebted to him, the said defendant, in a large sum of money, to wit, &c., for money by the said defendant before that time lent and advanced to, and paid, laid out and expended, for the said *Zachariah Jodon*, and at his special instance and request; which said sum of money, so due and owing from the said *Zachariah Jodon* to the said defendant, as aforesaid, exceeds the damages sustained by the said plaintiff, by reason of the non-performance by him, the said defendant, of the said supposed promise and undertaking in the said first count mentioned, and out of which said sum of money, so due and owing from the said *Zachariah Jodon* to the said defendant, he, the said defendant, is ready and willing, and hereby offers to set off and allow to the said plaintiff the full amount of the said damages, according to the form of the statute in such case made and provided; and this the said defendant is ready to verify, wherefore, &c.

3rd. As to the said *second* count, repeating same plea in bar as to the first count.

To these second and third pleas the plaintiff demurred generally, in which the defendant joined.

The county court rendered judgment on the demurrer for the plaintiff below, overruling the pleas in bar, and the defendant, after verdict, &c., on first plea, appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, MAGRUDER and MARTIN, J.

By F. A. SCHLEY for the appellant.

In this case, the appellant gave his promissory note, payable to *Jodon*, or order, six months after date. After the note was past due for some time, *Jodon* assigned the note to *Houck*, the appellee. Before the note was due, *Annan*, the drawer, had paid considerable sums of money, in the aggregate amounting to as much as the note, to *Jodon*, and for his use. These

Annan vs. Houck.—1846.

sums of money so paid, laid out and expended, &c., *Annan* pleaded as a set-off or discount to the note in the hands of *Houck*, the assignee, they being paid for *Jodon*, and to *Jodon*, before the assignment of the note. To this plea the plaintiff demurred, and the court gave judgment in favor of the plaintiff, for the amount of the note, overruling the demurrer.

The appellant will contend, that this judgment is erroneous, because the note being assigned when it was over-due, *Houck*, the assignee, took it, subject to all the equities that existed at the time of the assignment between the drawer and assignor. In other words, that the note being past due, the assignee stands in the shoes of the assignor, and has no greater rights, and will be subjected to all the defences that the assignor, had he sued, would be subjected to.

In support of his views, he cited the following references :

1729, *ch. 20. Balt. Ins. Co. vs. McFadon*, 4 *H. & J.*, 40. 1829, *ch. 51. Clarke vs. Magruder*, 2 *H. & J.*, 77. 1 *Stev. N. Prius.*, 860. *Brown vs. Davis*, 3 *Term*, 80, 83a. *Boehm vs. Sterling*, 7 *Term*, 429. *Burrough vs. Moss*, 10 *Barn. & Cres.*, 558. 21 *E. C. L.*, 128. 1 *Stev. N. P.*, 861. 3 *Kent*, 91, *Ed. 1844. O'Callaghan vs. Sawyer*, 5 *John.*, 118. *Bank of Niagara vs. McCrackem*, 18 *John.*, 493. *Ford vs. Stuart*, 19 *John.*, 342. *Bridge vs. Johnson*, 5 *Wend.*, 351, 355. *Driggs vs. Rockwell*, 11 *Wend.*, 508. *Evans vs. Smith*, 4 *Binney*, 369. *Ritchie and Wales, vs. Moore, &c.*, 5 *Munf.*, 395. *Sargent, et al., vs. Southgate*, 5 *Pick.*, 312. *Boylston vs. Greene*, 8 *Mass.*, 465. *Andrews vs. Pond, et al.*, 13 *Peters*, 79. *Robinson vs. Lyman*, 10 *Ct.*, 30.

By J. M. PALMER for the appellee, who contended :

1st. The act of Assembly of 1785, *ch. 46, sec. 7*, authorises the defendant to file an account in bar, or to plead discount of any claim he may have against the plaintiff. Therefore the appellee submits, whether the defendant in the court below, could, and was justified, in pleading a set-off of the said claims and demands he had against *Zachariah Jodon*, to defeat the plaintiff's action, as endorsee of said promissory note.

2nd. The promissory note in question being over-due, when endorsed and delivered to the appellee, was nevertheless negotiable, and the legal interest in the note passed to the appellee by virtue of the endorsement, &c.

3rd. The endorsee of an over-due promissory note is liable to such equities only as attach to the note itself, and not to claims arising out of collateral matters, between the original parties to the note.

4th. A plea of set off is not an equity, but is a legal defence in the nature of a cross-action for a legal demand, introduced to prevent a multiplicity of actions.

He cited as follows :

1785, 46, *sec. 7.* 5 *Wend.*, 342. *Wheeler vs. Raymond*, 5 *Cowen*, 231. 1829, *ch. 51.* *Raymond vs. Wheeler*, 9 *Cowen*, 296. 5 *Wend.*, 353. *Chandler vs. Drew*, 6 *New Hamp.*, 469. *Ranger vs. Cary, et al.*, 1 *Medcalf*, 374. *Charles vs. Marsden*, 1 *Taunt*, 223. *Balt. Ins. Co. vs. McFaddon*, 4 *H. & J.*, 40. *Holland vs. Makepeace*, 8 *Mass.*, 418.

MAGRUDER, J., delivered the opinion of this court.

A promissory note, executed by the plaintiff in error, to one *Zachariah Jodon*, or order, bearing date 13th September 1842, and payable six months after date, is the cause of action in this case.

It is not pretended that to this claim any defence can be offered, unless the matters set forth in the second and third pleas furnish such defence. Those pleas state, that the endorsement of said note, was made after it became due, to wit, on the 10th day of April 1843, and that *Jodon*, the endorser, before the commencement of this suit, and before the endorsement, to wit, on the day last mentioned, was indebted and still is indebted to said defendant, the plaintiff in error, for money lent and advanced, and paid, laid out and expended, to and for said *Jodon*, \$500, which exceeds the amount of said note; and this he offers to set off, and allow in this suit. To these pleas the defendant in error demurred, and thus is presented to us the only question, which, in this case, can be decided by the court:—Is a claim, which the defendant in the

Annan vs. Houck.—1846.

court below, (the drawer of the note,) had against the endorser who is no party to the suit, to be set off in this action, brought by the endorsee in his own name?

The decisions of the courts of *Maryland*, to which reference has been given by the counsel for the plaintiff in error, do not decide this question.

In the case of *Clarke against Magruder and others*, 2 *H. & J.*, 77, the demand which it was proposed to set off, was a legal demand which the debtor (the defendant in the suit,) had against the legal plaintiff, and it would seem from the report of the trial in the *General Court*, that the question which the court was asked to decide, was, whether the defendant could avail himself, in the form of a set-off, of a claim, which he had not at the time of the institution of the suit against him?

In the case of the *Baltimore Insurance Co. and McFadon*, 4 *H. & J.*, 31, the action was brought on a policy of insurance by *McFadon*, for the use of *Dorsey and Hollins*, and in discount or bar of that claim, the defendant offered in evidence, the promissory notes of the legal plaintiff, and others, to the defendants. The case was obviously unlike the present. The decision of the *General Court* was, that these promissory notes could not be received, in bar of the plaintiff's claim, that claim being for uncertain, unliquidated, damages. In the reversal of this opinion, the Court of Appeals, it is believed, only decided, that a liquidated claim which the defendant has against the plaintiff, may be set off against an unliquidated claim, on which the suit was brought, &c.

It is said, that if a man becomes the owner of a promissory note, after it is due, he takes it subject to all the equities to which it would be liable, if still in the hands of the endorser, that this is not universally true may be seen by a reference to the case of *Kemp's Ex. vs. McPherson and others*, 7 *H. & J.* 320. But what are the equities, of which a defendant may avail himself, in an action against the drawer of a promissory note by the endorsee, when the note is endorsed after it became due? *Chitty*, in his *Treatise on Bills*, p. 242, *Am. Edit.*, 1839, after the remark, "that there is a material distinction, in the effect

Annan vs. Houck.—1846.

of a transfer, before a bill (and it is equally true of a promissory note,) is due, and one made after that time," proceeds, "when a transfer of a bill is made, *after it is due*, whether by endorsement or mere delivery, it has been long settled, that at least it is to be left to the jury, upon the slightest circumstance to presume, that the endorsee was acquainted with the fraud, or had notice of the circumstances, which would have affected the validity of the bill, had it been in the hands of the person, who was holder thereof at the time it became due, and though the endorsee may have been ignorant of the fraud, yet any objection which might have been taken against the bill, when in the hands of the endorser, may be taken against him, if the bill or note when he took it, appeared *upon the face of it* to have been dishonored."

The plaintiff in error, had no such equity of which to avail himself. His note did not appear on the face of it, to be dishonored, and for the non-payment of it, when it became due, he assigns no reason. All that we are told by him is, that before the suit was instituted, and indeed before the endorsement of the note, (but *non constat*, that at the time the note became due,) he also had a claim against the payee, which he is willing to set off against the note, after it has been endorsed to another; who, it is to be presumed, in deciding upon this demurrer, was ignorant of any circumstances, which, by any form of pleading, would prejudice his claim against the drawer of the note.

A promissory note is certainly negotiable, as well after, as before it becomes due, and surely, the plaintiff in error is not entitled to more equity than an obligor in an assigned bond, yet even in equity, we are told by *Judge Johnson*, in the case *4 H. & J.*, 45, the debtor can have no redress where a claim had been transferred to a third person, who had no notice at the time he received the assignment.

A set-off means, a "cross-claim, for which an action might be maintained *against the plaintiff*, and is very different from a mere right to a deduction from, or reduction of, his demand, on account of some matter connected therewith." See the authorities cited, *2 Saunders on Pleading and Evidence*, 314,

Annan vs. Houck.—1846.

Am. Edit., 1829. Surely upon this claim, on which the plaintiff in error relies, no action could be instituted against the defendant in error, who is the plaintiff in this action.

As a reason why the plaintiff in error should be allowed to discount in this case, we are told, that the statutes of *George 2nd*, and our act of Assembly of 1785, ought to receive a most liberal construction. No doubt they are beneficial laws, and it may be, that the legislature might make them more so. But it is the business of courts, *jus dicere*, and not, *jus dare*. If the law of set off can be improved, let this be done by further legislation; not by misconstruction.

In 4 *Dallas' Reports*, p. 30, No. 1, *Mr. Justice Chase* of the *Supreme Court of the United States*, after remarking, "that by the rules which have been laid down for the construction of statutes, and the latitude which has been indulged in their application, the *British* judges have assumed a legislative power, and, under the pretence of judicial exposition, have in fact made a great portion of the statute law of the kingdom." adds, "of these rules of construction, none can be more dangerous than that, which, distinguishing between the *intent* and the *words* of the legislature, declares that a case, not within the meaning of the statute, (according to the opinion of the judges,) shall not be embraced in the operation of the statute, although it be clearly within the words; or, *vice versa*, that a case within the meaning, though not within the words, shall be embraced." Perhaps it was the fault of some judges, whose decisions have been read to us, that they did not avoid the error here imputed to *English* judges; did not "conform to the expressions of the legislature." Without commenting upon these, and such like cases, we prefer the decisions, and the reasoning in support of them, to be found in 8 *Mass. Rep.*, 418; 6 *N. H. Rep.*, 469; 10 *Connec. Rep.*, 30; and think, that "in an action upon a promissory note, in the name of the endorsee, *bona fide*, and for valuable consideration, a demand in favor of the maker against the endorser, is not admissible as a set-off, although the note may have been discredited when the endorser took it;" and therefore affirm this judgment.

Dawes vs. Thomas.—1846.

In thus disposing of this cause, we are warranted by the plain language of the law, which authorises a set-off, of “mutual debts between the plaintiff and defendant; and where the defendant shall have any claim or claims against the plaintiff.” In these cases, the defendant is allowed, if he thinks proper to set off his claim against the other. The power, or privilege here given to a defendant, is unknown to the common law. Courts, indeed, have always been in the practice, upon application, of setting off a judgment, which the defendant has against the plaintiff, against that which the latter has against the former. This practice, we are told, rests upon the general jurisdiction of courts over the suitors in them. 3 *East.*, 149. 1 *M. & Sel.*, 240. 4 *Durnford and East.*, 123. Before judgment is obtained, the right of the defendant to set off his claim, depends entirely upon statute, and there is none of force in *Maryland*, which will authorise the plaintiff in error to set off his claim, in bar to this suit.

JUDGMENT AFFIRMED.

EDWARD DAWES vs. EVAN THOMAS.—*December 1846.*

By the act of 1840, ch. 109, sales made and reported during the recess of the county courts, by any trustee, under their decree, on being filed in their clerk's office, shall stand for final ratification, *provided* there be entered on the docket, a notice of motion for final ratification, to be given or published in such form as the rules of said courts may respectively prescribe. The rule of *M.* county court ordered, *that such notice*, at least one month before final ratification, be served upon all the parties therein, or published, &c. A notice was entered on the 16th May. Service admitted by the complainant on the 18th; and given to the defendant on the 1st June. On the 2nd July, the sale was ratified. HELD, that the act and rule were strictly complied with.

Where the decree for a sale ordered the appointed trustee to give bond in the penalty of a prescribed sum; he gave bond for a less sum, which was accepted by the court and approved, and he proceeded to make and report a sale, this is no ground to vacate an order of final ratification.

In sales, under decree by trustees, appointed by the court for that object, the court is regarded as the vendor, with whom the contract of sale is made, through the agency of the trustee. The penalty of the trustee's bond rests

Dawes vs. Thomas.—1846.

in the discretion of the court, and may be enlarged or diminished, according to the circumstances of the case.

A decree cannot be altered, after it has been enrolled, except by a bill of review.

Where a decree is still under the control of the court, if the term has not passed, it may be reheard upon petition.

These rules relate only to the decree, so far as it acts upon the subject of the bill, and have no application to that part of the decree, which is merely directory, as to the mode in which it is to be enforced.

APPEAL from the Equity side of *Montgomery* county court.

On the 7th March 1842, the appellee filed his bill against the appellant, in relation to a sale of land made by him, in 1832, to the appellant, of which the latter took possession. The credits having expired, the purchase money being unpaid, the purchaser being greatly embarrassed, having no other property than that in question, and the appellee's writs at law against him being returned *non est.*, he prayed for a sale of the land, enforcement of the vendor's lien, &c. The defendant consented to a decree for a sale, which was accordingly decreed in March 1843.

On the 16th May 1844, the trustee of the court, to make the sale, reported; at or about the time, and at the place appointed, he attended and offered the premises by the acre, upon the terms prescribed by the decree: those present being first informed, that the lands were supposed to contain from four hundred and twenty, to four hundred and sixty acres, as ascertained since the advertisement, but would be surveyed, if required, at the joint expense of the seller and purchaser, and that they would not be struck off for less than the debt and interest, which was estimated at \$3284.62. No bid being made for the land, as thus offered by the acre, the trustee, after dwelling some time, offered the lands in the gross, or one lot, whatever number of acres it might contain, and cried the same at the sum of \$3284.62, which he was previously authorised to do; at which price, no higher offer being made, after full notice to all present, the lands were sold to *Francis Valdenar*, who has fully complied with the terms of sale; and on same day, gave notice of a motion, at July term, to ratify the sale duly entered, of which service was admitted by the com-

plainant, on the 18th May, and served on the defendant the 1st June 1844.

On the 2nd July 1844, the sale was finally ratified, the defendant, at the same time, objecting to the ratification :

1st. The property was sold for much less than its real value, and less than the purchaser would have given for it, if he had been opposed, he making the only bid, covering the amount of the plaintiff's claim, and costs.

2nd. The property was not sold according to the terms of the advertisement.

3rd. The property was sold in a body, when it was susceptible of division, thereby excluding purchasers and competition, which would have enhanced the amount which could have been obtained for it.

These objections were overruled.

On the 6th March 1845, the reported purchaser prayed the court to substitute *Benjamin F. Middleton* as a purchaser in his place, which was ordered, and the trustee directed to convey on payment of the purchase money.

The defendant appealed to this court from the final order of ratification.

The cause was argued before ARCHER, C. J., SPENCE, MAGRUDER and MARTIN, J.

By BOYLE for the appellant, who insisted :

FIRST. That under the act of 1840, ch. 109, sec. 2, which enacts, that any sale made and reported during the recess of the court, by any trustee appointed by any county court, as a court of equity, on being filed in the clerk's office, shall stand for final ratification, without the necessity of procuring a *nisi* order thereon; provided there shall be entered on the docket a notice of motion for final ratification, to be given or published in such form as the rules of said courts respectively may prescribe. There was not entered on the docket such a notice of motion for final ratification of the trustee's sale, as that act of Assembly requires :

1st. Because such notice should be specific as to the term, and day of the term, when such motion is to be made, that the parties interested may not be taken by surprise.

Dawes vs. Thomas.—1846.

SECOND. There was not such a service of the notice of the intended motion for final ratification, as is required by the practice of courts of chancery, because the service must be made, by serving the party with a copy of the notice, personally, or by leaving it at his dwelling house or usual place of abode.

THIRD. There was no evidence to the court, that the service was made according to the practice of courts of chancery :

1st. Because such service must be proved by the affidavit of the person serving it.

2nd. The manner of service should appear in the body of the affidavit, that the court may be enabled to judge if the service be correct.

3rd. The affidavit should be particular in setting forth the manner of service; and, if personal, that a true copy of the notice was read to him, or by delivery to him; and, if the service be not personal, that a true copy was left at his dwelling house or usual place of abode; and should also set forth, by whom it was made, with what person it was left, and when, and where, and every other circumstance of service.

4th. Because the penalty in the bond executed by the trustee, was for a lesser sum than the decree required, being \$5000, instead of \$6000.

5th. That the act of 1840, ch. 109, sec. 2, is a departure from the former mode of confirming trustee's sales, and therefore should be construed with great strictness; because, if not construed with much caution and strictness, a want of order and diversity of practice will be introduced into each judicial district, instead of the uniform system which has hitherto prevailed.

6th. Because a decree of a chancery court cannot be changed, without a written order to that effect, in the nature of a new decree.

7th. Because an order for a decree cannot be reversed, altered or explained, except by a re-hearing, and if signed and enrolled by a bill of review.

By R. J. BOWIE and ALEXANDER, who relied upon the following rule of *Montgomery* county court :

March term, 1843.—Ordered, that the notice of motion for final ratification of trustee's sale, made under the second section of the act of 1840, ch. 109, shall, at least one month before the passage of the final ratification, be served upon all the parties interested therein, or published for three successive weeks in such newspaper or newspapers as the clerk of the county shall prescribe, agreeably to the provisions of the act of Assembly in such case made and provided.

And then contended :

1st. There was no error in the judgment of the court below, in overruling the motion to strike out the order of final ratification, there being no foundation laid to warrant the court in thus setting aside its own proceedings.

2nd. That the sale made by the trustee, was made in strict conformity to the terms of the decree.

3rd. That the property was sold for a full equivalent, and there was no such inadequacy of price, as would justify the court in setting aside the sale on that ground.

MARTIN, J., delivered the opinion of this court.

This case comes before us, by an appeal from an order of *Montgomery* county court, as a court of equity, pronounced on the 2nd of July 1844; finally ratifying and confirming a report of sales, which had been made by a trustee of the court.

The order directs, that the sales within reported be ratified and confirmed, no cause to the contrary thereof, having been shewn; although notice appears to have been given, as directed by the rule of that court, in pursuance of the act of Assembly, 1840, chap. 109.

The act of Assembly, to which the court refer in their order, provides :

“ That any sale made and reported during the recess of the court, by any trustee, under the decree of any county court, as a court of equity, on being filed in the clerk's office, shall stand for final ratification, without the necessity of procuring a *nisi* order thereon; provided there shall be entered on the docket a

Dawes vs. Thomas.—1846.

notice of motion for final ratification thereof, to be given or published in such form as the rules of said courts respectively prescribe.”

The rule prescribed by the court, in pursuance of this act of Assembly, is as follows :

“ Ordered, that the notice of motion for final ratification of trustee’s sale, made under the second section of the act of 1840, chap. 109, shall, at least one month before the passage of the final ratification, be served upon all the parties interested therein, or published for three successive weeks in such newspaper or newspapers as the clerk of the county shall prescribe, agreeably to the provisions of the act of Assembly.”

It appears from the record, that the complainant, on the 16th of May 1844, entered on the docket, notice, that he would move for a final ratification of the sale, at the ensuing July term of the court. Service of this notice was admitted by the appellee, on the 18th of May 1844, and is proved to have been served on the appellant, on the 1st of June 1844, by the return of the deputy sheriff. As therefore more than one month elapsed between the period of the notice and the order of ratification, the rule of the court was strictly complied with, and no just exception can, on this ground, be taken to the order of ratification.

The decree of the county court, of the 13th of May 1843, by which the lands mentioned in the bill were ordered to be sold, provides, that the trustee shall execute a bond in the penalty of six thousand dollars.

A bond was executed by the trustee, in a penalty of five thousand dollars. This bond was accepted by the court; and the report of sales by the trustee, in which he states, that *Henry Valdenar* had become the purchaser of the property, and had complied with the terms of sale, was, as we have seen, finally ratified on the 2nd of July 1844.

Under such circumstances, the counsel for the appellant has contended, that the order of ratification is to be set aside, and the sale vacated, on the ground, that the penalty in the bond executed by the trustee, although accepted by the court, was in a sum less than that specified in the decree.

Mayhew, *et al.*, vs. Graham and another.—1846.

In cases of this kind, the court is regarded as the vendor of the property, with whom the contract of sale is made, through the instrumentality of a trustee. As the agent of the court, by whom the sale is accomplished, the trustee is required to execute a bond for the faithful performance of the duty entrusted to him; but the penalty in which that bond is to be taken, rests in the discretion of the court, and may be enlarged or diminished, according to the circumstances of the case. It is a matter between the court and their trustee, intended for the protection of those interested in the distribution of the purchase money, and cannot, in any respect, affect the validity of the sale.

It is certainly an established principle, that a decree cannot be altered, after it has been enrolled, except by a bill of review, or by a petition in writing for a rehearing, if the term has not passed, and the decree is still under the control of the court. This rule, however, relates only to the decree, so far as it acts upon the subject of the bill, and has no application to that part of it, which is merely directory as to the mode in which it is to be enforced.

The order of ratification is, we think, free also from this objection, and it must be affirmed.

ORDER AFFIRMED.

WILLIAM E. MAYHEW AND OTHERS, *vs.* WILLIAM GRAHAM,
AND WILLIAM S. PAWSON.—*December* 1846.

In an action at law to recover the value of materials furnished to a vessel, it appeared that the plaintiff had sold and delivered them, upon the request of *B*, to whom they were charged on the books of the plaintiff; that a month before, *B* had executed a bill of sale of the vessel to the defendants, who immediately after took the oaths of ownership under the acts of Congress, and had a register executed in their own names, one of them being therein described as master. The vessel sailed on her voyage. The plaintiffs offered in evidence the application of the defendants for insurance on her hull and freight, and the policies issued thereon, dated about a month after the supplies were furnished. The plaintiffs stated, that the object of

Mayhew, *et al.*, vs. Graham and another.—1846.

offering the order for insurance, and the policies in evidence, was to show a continuing title in the defendants to the vessel, from the execution of the bill of sale to the date of the order. **HELD**, that the evidence was admissible.

Prior to the 6th October, *B* was the owner of a vessel. On the 15th November, as owner, he chartered her to *H* for a voyage, to be paid freight a sum certain by the month, and agreed to put her in good repair to prosecute the contemplated voyage. On the 10th December, the plaintiffs, at the request of *B*, sold and delivered him supplies for the vessel, on six months' credit. The master of the vessel was appointed by *H*. She performed her voyage, and returned to her port of departure in about eight months. It also appeared, that on the 6th October, *B* executed a bill of sale of the vessel to the defendants, who thereupon subscribed the usual oaths at the custom house, and took out a register in their own names. After the vessel sailed on her voyage, they effected insurance upon her hull and freight, payable to themselves in case of loss. During the months of *October* and *November*, she was in the possession of *B*, and after the charter, in the possession of *H*. The defendants had no possession, and exercised no control over the vessel, until after her return, when they sold her. Immediately after the vessel sailed, the defendants gave *H* notice to pay the freight to them. In an action by the material men, the defendants, *for the purpose of showing that they held the title to the said vessel, under the bill of sale, in trust, as a security to pay B's note, dated 7th October, payable at four months*, proposed to prove, that *B* was their debtor upon that note; that they, on the 21st January, took an assignment of the charter party from *B*, expressed "to secure such note," the vessel "mentioned therein having been transferred to them before the charter was made," and to prove such note and assignment; that *B* gave the defendants credit for the premium of insurance paid by them; that the freight received by defendants, was credited to *B* by defendants on account of said note, and the proceeds of her sale were likewise credited by them to *B*. **HELD**, by the *county court*, that the note, assignment of the charter party, entries of charges and credits on the books of either *B* or the defendants, were inadmissible for the purpose for which they were offered. Affirmed upon appeal by a division of this court.

Upon the whole evidence, the county court *refused* to instruct the jury:

- 1st. That there was no evidence from which the jury might infer, that *B* acted as the agent of the defendants, in purchasing said supplies, or that he had any authority or directions, express or implied, from defendants to purchase the same on their account.
- 2nd. That although the supplies were delivered for the use of the vessel, yet, if they were sold to *B*, on his own credit, and not upon the credit of the defendants, the plaintiffs cannot recover.
- 3rd. That if sold to *B*, upon his special personal request, the plaintiffs cannot recover, although applied to the use of the legal, general owners, under the bill of sale and register.

Mayhew, *et al.*, vs. Graham and another.—1846.

- 4th. That if the jury believe, that *B* had the possession and control of the vessel after the date of the bill of sale, and exercised acts of ownership over her, and directed how she should be managed, that he continued to have such possession and control—made the charter party—that *H* appointed the master, and that the defendants never had any possession or control from the time of the execution of the charter, until the completion of the voyage, and in no way interfered with said vessel or charter, except to request *H* to pay them the freight; that then *B* was owner, so far as to be competent to execute the charter, and his stipulations in the charter did not raise any *assumpsit* on the part of the defendants, to pay for the supplies in question.
- 5th. That although the jury may find, the defendants were the legal, general owners of the vessel—took possession of, and sold her after the voyage was completed—assented to the making of the charter, or made no objection to it after it was made, still, if the supplies were furnished, upon request of *B*, in fulfilment of the charter, the plaintiffs cannot recover.
- 6th. That if the jury find that, at the time when the charter was executed, *B*, by the permission of the defendants, had the possession and control of the vessel—had had previous possession and acted as owner, then it was competent for him to make said charter as owner, and to recover the freight thereon for his own use, and was responsible for said supplies, and the defendants were not responsible as general owners, whether the plaintiffs knew that the defendants were such owners or not, provided the supplies were sold to *B*, upon his special request, were charged to him; and the jury believe, that *G*, one of the plaintiffs, advised the defendants to procure the assignment of the charter.
- 7th. That if the jury find, that the legal title to the vessel was in the defendants, *M*, *F*, and *M*; yet, if they believe, they held such title for the use of the firm, *W E M & Co.*, which included another partner, that the firm procured insurance, and requested *H* to pay the freight to said firm, by reason of the beneficial interest they had, and not as general owners, then the fact of obtaining such insurance, is not evidence of such ownership as to charge them, the defendants, as owners.
- 8th. That if the jury find, that *B* never did deliver the actual possession of said vessel to the defendants, or any of them, in pursuance of the bill of sale, and the defendants never took possession of her until her return—then the title of the defendants was never perfected, so as to render them responsible for any supplies furnished, upon the request of *B*, after the execution of the charter party, while he held possession and had control as owner of said vessel.
- 9th. That if the jury find from the evidence, that the supplies furnished or delivered for the use of the vessel, were sold to *B*, upon his credit, and not upon the credit of the defendants, then the plaintiffs are not entitled to recover, unless the jury find from the evidence, that *B* was the agent of the defendants in purchasing the same from the plaintiffs.
- All which refusals were affirmed, upon appeal, by a division of this court.

Mayhew *et al.*, vs. Graham and another.—1846.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, brought to May term 1842, of said county court, by the appellees against *W. E. Mayhew & Co.*, the firm consisting of *William E. Mayhew*, *William D. Miller*, *Alexander Fisher*, and *Gorham Brooks*. Errors of pleading and misjoinders of parties were mutually waived. The defendants pleaded *non assumpsit*, and the verdict was for the plaintiffs.

1ST EXCEPTION. At the trial, the plaintiffs gave in evidence by *Henry Hinkley*, that between the 15th and 20th November 1841, *Hugh Boyle* called at the store of the plaintiffs and had some conversations with one of the plaintiffs, and requested him to go and examine the ground tackling of the brig *Harriet*, to see if they would do for a voyage to the coast of *Africa*. That afterwards *B.* called several times, and had conversations with said *W. Graham*, and though he, the witness, did not hear all that passed between said *B.* and *G.*, he knows that the claims charged in the account now produced and shown to witness, to wit:—

“BALTIMORE, 10th December 1841.

Mr. Hugh Boyle bought of *William Graham*,

90 fath. 1 inch chain, wg. 5570 lbs., a 7½ cts., \$417 75

60 “ ¾ do. “ “ 2760 “ a 7¾ “ 213 90

\$631 65”

Were certainly sold by the plaintiffs to said *B.*, for the said brig *Harriet*, at the prices stated in the account. That said chains were ordered about the 20th November, and delivered to the drayman of said *B.*, on or about the 10th December, and that on the same day they were charged to the said *B.*, in the books of the plaintiffs. That a day or two afterwards, or perhaps the same day, the witness as clerk of the plaintiffs, made out said account of said chains against said *B.*, and carried and delivered the same to said *B.* That he, the witness, understood the said chains were sold on a credit of six months, and that *B.* was to give his note for them accordingly.

Upon cross-examination the witness stated, that a short time after the plaintiffs heard that *B.* had become insolvent, he, the

Mayhew, *et al.*, vs. Graham and another.—1846.

witness, heard *Graham* say, that he, *G.*, had advised *W. E. Mayhew*, to procure from *Boyle*, an assignment of the charter party for said brig *Harriet*, that had been made by *Boyle* to *James Hall*.

Upon further examination-in-chief, the said witness testified, that *B.* failed in a few days, perhaps a week or less, after the delivery of said chains. That since this suit was brought, he has heard said *Graham* say, that said *Mayhew* had stated to him, that he, *M.*, did not consider himself personally responsible for the said chains, but that he thought that the brig was liable. That after the sale and delivery of the said chains, he often heard said *G.* say, that he supposed that said *B.* was the owner of said brig, at the time when the sale of said chains was made to him.

The plaintiffs then read in evidence the bill of sale conveying the entire interest of the brig *Harriet* from *Boyle* to *William E. Mayhew*, *Alexander Fisher*, and *William D. Miller*, bearing date the 6th October 1841; it being admitted to have been executed by *Boyle*, and delivered to the grantees therein named.

The plaintiffs further gave in evidence by *Ring*, that he was a clerk in the custom house in the city of *Baltimore*, in the year 1841; and that on the 8th day of October of that year, *W. E. M.*, *A. F.*, and *W. D. M.*, appeared in said custom house, and in pursuance of the laws of *The United States*, took out a register for said brig, and made the oath therein contained, in which register it was recited, they "In pursuance of an act of the Congress," &c., *W. E. M.*, *A. F.*, and *W. D. M.*, of *Baltimore*, &c., "having sworn that they are the only owners of the ship or vessel called the *Harriet of Baltimore*, whereof *Alexander Fisher* is at present master, &c.; and also proved the oath of ownership subscribed by the said defendants, dated 8th October 1841, and on which said register was granted.

The witness, *Ring*, further testified, that *Fisher* was named and sworn as master of said brig, at the time when said registry was made.

Mayhew, *et al.*, vs. Graham and another.—1846.

Upon cross-examination the said witness testified, that said *Fisher* was a merchant, of the firm of *W. E. M. & Co.*; and that he never did, to the knowledge of this deponent, go on board of said brig. That it is necessary when a registry of a vessel is made, that some one should be named as master; and that if there be no acting master, it is the custom to name some one as master.

The plaintiff then offered to read in evidence to the jury, the original offer in writing, made in the name of *W. E. M. & Co.*, to the *Neptune Insurance Co.*, for insurance upon the said brig *Harriet* and her freight, dated 19th January 1842, payable to them in case of loss, which paper, it was admitted, was signed by *W. E. M.*, one of the defendants, in the name and on behalf of the firm of *W. E. M. & Co.*, which was composed of all the defendants named in the record of this case, and the policy of insurance effected in their name on such offer for insurance, accepted by said company.

To the reading of which offer and policies, the defendants objected, as inadmissible evidence; the purpose for which they were offered being stated to be, to show a continuing title to said brig in the grantees, named in said bill of sale of 6th October 1841; although it was admitted that there was an agreement in this cause, between the counsel, that no objection should be taken on account of the misjoinder, as defendant, of *Gorham Brooks*, and that the suit should be prosecuted as if instituted against the other three defendants only. The county court, (LE GRAND, A. J.,) overruled the objection, and declared the order and policy to be admissible.

2ND. EXCEPTION. The plaintiffs having given in evidence the matters stated in the defendants first bill of exceptions, further gave in evidence the admitted fact, that said brig was cleared at the said custom house for her voyage to *Africa*, on the 20th December 1841. And further offered in evidence to the jury, a bill of sale of said brig, from *W. E. M.*, *A. F.*, and *W. D. M.*, of 2nd November 1842, to *Greenbury B. Wilson*, which was admitted to have been executed.

The defendants then, to support the issue on their part, read in evidence to the jury the charter party for said brig *Harriet*,

Mayhew, *et al.*, vs. Graham and another.—1846.

dated 15th November 1841, made from said *Hugh Boyle*, as owner, to *James Hall*, for a trading voyage from *Baltimore* to the coast of *Africa*, at the rate of \$300 per month; its execution being admitted. The charter party stipulated, that the said owner agrees to put the said brig in good and approved repair, so as to fit her for the accomplishment of the said voyage. And further gave in evidence by the testimony of *James Hall*, that he is the person named in said charter party, as freighter, and that he and said *Boyle* executed the same on the day of its date, and that immediately after the execution of said charter party, he, the witness, as freighter, in pursuance of said charter party, took possession of said brig, and appointed *William Champion* master of said brig, who immediately went on board. That he, said *Hall*, had the entire and exclusive possession and control of said brig, during the voyage mentioned in the charter party; and that said *Champion* continued to act as her master for the whole of said voyage, which terminated in July or August 1842. That none of the defendants, to his knowledge, had any possession or control of said vessel, before she sailed from the port of *Baltimore* on said voyage. That immediately after she had sailed, he received a notice from *William E. Mayhew & Co.*, to pay the freight to them; and he knows of no other act of any of the defendants in regard to said vessel, until after her return from *Africa*.

Upon cross-examination, the counsel for the plaintiffs then propounded to the said witness, *Hall*, the following question, viz., "When you appointed said *Champion* master of the brig *Harriet*, did you authorise him, *Champion*, to act as agent of *Mr. Boyle*, in procuring the supplies under the charter party?" To which question, and the answer that might be given thereto by the witness, the defendants by their counsel objected, as irrelevant to the issue in this cause, and inadmissible and improper testimony; but the court, (LE GRAND, A. J.,) overruled the said objection, and adjudged the said question proper, and the answer thereto, admissible testimony. And thereupon the said witness, *Hall*, in answer thereto, stated to the jury, that when he, the witness, closed the charter party with *Mr. Boyle*, he made a verbal agreement with him, *Boyle*, that captain

Mayhew, *et al.*, vs. Graham and another.—1846.

Champion should act as his, *Boyle's*, agent, in procuring supplies in fitting the vessel for the voyage, agreeably to *Mr. Boyle's* stipulations in the charter party. That said *Champion* was not then present. That afterwards he introduced said *Champion* to said *Boyle*, and told him to obey the instructions of *Mr. Boyle*, in procuring the articles requisite for the vessel, under the charter party. Whereupon the defendants excepted to the opinion of the court, in declaring said testimony of said *Hall*, (so as aforesaid objected to,) admissible.

3RD EXCEPTION. The plaintiffs and defendants having given in evidence, respectively, the matters stated and set forth in the defendants' first and second bills of exception, and which are to be considered as a part of this, their third bill of exception; the defendants, then, to support the issue on their part, gave in evidence to the jury, by said witness *Hall*, that he, *Hall*, never gave said *Champion* any order or authority to buy said chains; and that he, the witness, does not know who did, in fact, buy said chains.

The defendants, further to support the issue on their part, then gave in evidence to the jury by *Charles L. Oudeshuys*, that he acted as the clerk of said *Hugh Boyle*, during the year 1841, and until after July 1842. That the bill or account of the plaintiffs, for said chains, now shewn to him, the witness, (being the same account and paper spoken of in the testimony of the witness, *Henry Hinkley*,) was presented to said *Boyle*, in December 1841, and was by said *Oudeshuys*, as his clerk, entered in the books of said *Boyle*, to the credit of said *William Graham*, on the eleventh day of that month. That said *Boyle* was in good credit at that time. That he first let a note lie over about the 25th of said month of December 1841. That he, said *Oudeshuys*, subscribed his name as a witness for said charter party, and saw it executed by the parties thereto. That he knows that said *Boyle* had the possession and control of said brig *Harriet*, during the months of *October* and *November* 1841, at the time of the execution of the said charter party, from the fact that he continued to exercise acts of ownership, as he had always done. That prior to the execution of said charter party, said brig was lying some time at *Ramsay's*

Mayhew, et al., vs. Graham and another.—1846.

wharf, on *Fells Point*; that said *Boyle* employed one captain *Cunningham* to look after her there, and paid some small expenses on her, and was chargeable with wharfage for her, and gave directions from time to time how she should be managed, and acted as owner, as he had always done. That he had owned said vessel for some years, and was desirous of procuring a freight for her before said charter party was made. That none of the defendants, to the knowledge of the witness, had any possession of said vessel until after her return from *Africa*, in July or August 1842. The defendants, then, further to support the issue on their part, and for the purpose of shewing that the said *W. E. M.*, *A. F.*, and *W. D. M.*, held the title to said brig under said bill of sale, in trust as security, to pay the note hereinafter mentioned and inserted, made by said *Boyle*, in favor of *W. E. M. & Co.*, and to shew that said *Boyle* made said charter party on his own account, and for his own benefit, with the assent of the said *W. E. M.*, *A. F.*, and *W. D. M.*, and that they and their partner, *Gorham Brooks*, took an assignment from said *Boyle* of said charter party, and the freight thereby to become payable; also, as security for the payment of said note, offered to give in evidence by said witness, *Oudesluys*, that he, the said witness, at the request of said *Boyle*, and the said *William E. Mayhew*, one of the defendants wrote upon the sheet of paper containing said charter party, an assignment of said charter party from said *Boyle* to the said *W. E. M.*, *G. B.*, *A. F.*, and *W. D. M.*, in form following :

“I hereby assign and transfer the foregoing charter party, and all my interest therein, to *W. E. M.*, *G. B.*, *A. F.*, and *W. D. M.*, of the firm of *W. E. M. & Co.*, as security to them for the payment of my note, four months from 7th October 1841, for \$2628.17, held by them, and discounted by them for my use, the brig *Harriet*, mentioned therein, having been by me transferred to them before the foregoing charter party was made. *Baltimore*, 21st Jan’y 1842. HU. BOYLE.

Witness, *Charles L. Oudesluys*.”

And that he, said *Oudesluys*, saw the said *Boyle* subscribe his name to said assignment, and that he, said *Oudesluys*,

Mayhew, *et al.*, vs. Graham and another.—1846.

signed his own name as witness thereto, and saw the said charter party, and the said assignment thereon, then delivered to said *Mayhew*. And the defendants further offered to prove by said witness, *Oudesluys*, that said *Boyle* made and delivered to the said *William E. Mayhew & Co.*, on the day of its date, the following promissory note :

“\$2628.17.

BALTIMORE, *October 7th*, 1841.

Four months after date, I promise to pay to the order of *Messrs. Wm. E. Mayhew & Co.*, twenty-six hundred and twenty-eight dollars, and seventeen cents, for value received.

HU. BOYLE.”

And offered to prove by said witness, that the said note was the note mentioned in said assignment, and that it was never paid by said *Boyle*. And then the said defendants offered to read in evidence, the said assignment of said charter party, and of said note. And further offered to give in evidence by said witness, that the said note, and the premiums of insurance paid by the said *W. E. M. & Co.*, for said policies of insurance on the brig *Harriet*, and her freight, were credited in the books of said *B.*, (produced in court on the trial of this cause,) to the said *W. E. M. & Co.* And further offered to give in evidence by one *Grafflin*, that he was a clerk in the store of the said *W. E. M. & Co.*, in the years 1841, and 1842, and 1843, and that the freight of said brig, on the day it was received, viz., the 29th day of August 1842, and before this suit was instituted, was credited on the books of said *W. E. M. & Co.*, to said *B.*, in part payment of said note of said *B.*, then due and unpaid, and which was charged by said firm to him; and furthermore, that the proceeds of said vessel, after she was sold by said *M.*, *F.* and *M.*, to *Greenbury B. Wilson*, in November 1842, were likewise credited to said *B.* by said *W. E. M. & Co.* But the plaintiff objected to the admissibility in evidence of said assignment of said charter party, and of said note of said *B.*, in favor of *W. E. M. & Co.*, for the purpose for which the same were offered, and of all and every of said entries, charges and credits, contained either in the books of said *B.*, or of the said *W. E. M. & Co.*, so offered, to be given in evidence on the part of the defendants

Mayhew, *et al.*, vs. Graham and another.—1846.

by the said witnesses, *Oudesluys* and *Grafflin*, respectively. And the court, (LE GRAND, A. J.,) sustained the objection to the whole of said evidence, and every part, and the same wholly excluded from the jury. The defendants excepted to the opinion of the court, in rejecting said evidence, and every part and parcel thereof.

4TH EXCEPTION. And the plaintiffs further to support the issue on their part, gave in evidence by *John Henderson*, that the firm of which he is a member, furnished supplies for the brig *Harriet* in November 1841, for her voyage to the coast of *Africa*, but that he did not know who was the reputed owner of said brig at that time. That he and his partner thought captain *Hall* was the owner when they furnished supplies for her.

Upon the whole evidence given to the jury, upon the trial of this cause, the defendants, by their counsel, prayed the opinion and the several instructions from the court to the jury, as follows :

1st. That there is no evidence in this cause from which the jury may infer, that *Hugh Boyle* acted as agent of the defendants, in purchasing the iron chain of the plaintiffs, the price of which they seek to recover in this action, or that he had any authority or directions, express or implied, from the defendants to make said purchase on their account.

2nd. That although the jury find from the evidence, that the iron chains, charged in the plaintiff's account to *Hugh Boyle*, were delivered for the use of the brig *Harriet*; yet, if they find that said chains were sold to *Hugh Boyle*, on his credit, and not upon the credit of the defendants, that then the plaintiffs are not entitled to recover in this action.

3rd. That if the jury find from the evidence, that the plaintiffs sold and furnished for the brig *Harriet* the iron chain aforesaid, upon the special personal request of *Hugh Boyle*, upon a credit of six months, and delivered the same to his drayman, and sent the account therefor to said *Boyle*, that then the plaintiffs are not entitled to recover, although the jury may find, that the said chains were, or some of them were, applied to the use of the legal, general owners, by virtue of

the bill of sale from *Hugh Boyle*, and the registry of said brig in the custom house, as given in evidence.

4th. That if the jury believe, that *Boyle* had the possession and control of the said brig *Harriet*, after the date of the said bill of sale, and exercised acts of ownership over her, by employing *Cunningham* to look after her, and by paying bills and expenses, and directing how she should be managed, and that he continued to have such possession and control, and to perform such acts of ownership, up to the time of the execution of the charter party given in evidence, and that he made the charter party to *Hall*, and that *Hall*, immediately thereafter, took possession of said vessel, under the charter party; and also appointed *William Champion* the master of said vessel; and that the defendants never had any possession or control of said vessel, from the time of the execution of the said charter party, until the completion of the voyage, in July or August 1842, and in no way interfered with said vessel or the said charter party, except to order or request *Hall*, the freighter, to pay the freight to *Wm. E. Mayhew & Co.*, that then *Boyle* was owner, so far as to be competent to execute the charter party, as owner for the voyage, and that his stipulations by the charter party, to furnish the supplies to fit the brig for the voyage, did not raise any obligation or *assumpsit* on the part of the defendants to pay for those supplies.

5th. That the defendants are not responsible to pay for the chains furnished in the month of December 1841, to the brig *Harriet*, upon the request of *Boyle*, after the execution of said charter party, in fulfilment of his, *Boyle's*, agreement in the charter party, although the jury may find, that the defendants were the legal, general owners of said brig, and took possession of her, and sold her after the said voyage was completed, in November 1842, provided they find, that the defendants assented to the making of said charter party, or made no objection to it after it was made.

6th. That if the jury find, that at the time when the charter party was executed, *Boyle*, by the permission of the defendants, had the possession and control of said vessel, and had for some time previously had such possession and control, and had

Mayhew *et al.*, vs. Graham and another.—1846.

acted as owner, that then it was competent for *Boyle* to execute said charter party as owner, and to recover the freight thereon for his own use, and he was responsible to pay for the chains furnished by plaintiffs, upon *Boyle's* request, and the defendants were not responsible as general legal owners of said brig, to pay for said chains so furnished, whether the plaintiffs knew that the defendants were such owners or not, provided the jury find, that the said chains were sold by the plaintiffs to *Boyle*, upon his special request, and were charged to him; and if the jury believe, that *Graham*, one of the plaintiffs, advised the defendants to procure an assignment of said charter party to themselves.

7th. If the jury find from the evidence, that the legal title was in *W. E. M.*, *A. F.*, and *W. D. M.*; yet, if they believe that they held such title for the use of the defendants, constituting the firm of *William E. Mayhew & Co.*, and that this firm procured insurance on said brig and freight, and ordered or requested *Hall* to pay the freight to said company, by reason of the beneficial interest they had, and not as general owners, that the fact of their obtaining such insurance, is not evidence of such ownership as to charge them, the defendants, as owners.

8th. That if the jury find, that *Boyle* never did deliver the actual possession of said brig to the defendants, or any of them, in pursuance of the bill of sale of October 1841, and the defendants never took possession of her until her return from *Africa*, in July or August 1842, that then the title of the defendants was never perfected, so as to render them responsible for any supplies furnished to said brig, upon the request of *Boyle*, after the execution of the charter party, by him made or executed, while he held possession, and had the control as owner of said brig.

9th. That if the jury find from the evidence, that the iron chain charged in the plaintiff's account, and furnished or delivered for the use of the brig *Harriet*, was sold to *Hugh Boyle*, upon his credit, and not upon the credit of the defendants, that then the plaintiffs are not entitled to recover in this action, unless the jury find from the evidence, that *Boyle* was agent of the defendants in purchasing the said chains from the plaintiffs.

Mayhew, *et al.*, vs. Graham and another.—1846.

But the court, (LE GRAND, A. J.,) refused to grant each and every one of said several prayers. The defendants excepted to the opinion and decision of the court, in refusing to grant each of said prayers, and appealed to this court.

The cause was argued before DORSEY, CHAMBERS, MAGRUDER and MARTIN J.

By HINCKLEY for the appellants, and
By TEACKLE and J. N. STEELE for the appellees.

MAGRUDER, J., delivered his opinion as follows :

It has already been decided by this court, in the case of *Henderson and Mayhew, and others*, 2 Gill, 393, that the owner of a vessel may be made answerable for supplies and articles procured by his agent, as in that case, although those articles had been charged to the agent, provided the vendor was ignorant at the time that such agent was not the owner.

This action was brought by the defendant in error, in order to recover the price of the various articles furnished for the brig *Harriet*, and the plaintiff could only recover, by proving to the satisfaction of the jury, that the defendants in the court below were, at the time, the owners of this vessel. In order to prove them to be the owners, a bill of sale, previously executed by *Hugh Boyle* to the defendants in the court below, was offered in evidence. Thereupon the defendants offered to prove by parol testimony, that this deed, though on its face a bill of sale, was understood, and intended by the parties to it, to be a mortgage. Was such testimony, for such a purpose, admissible?

In the case of *Wesley and Thomas*, decided, (see 6 H. & J., 24,) in 1823, the court said, "by the rule of the common law, independent of the statute of frauds and perjuries, parol proof is inadmissible to contradict, add to, or vary the terms of the original agreement. This principle is founded in the wisest policy; it guards the chastity of written contracts against *all* interpolations, by considering the agreement as furnishing the best evidence of the intention of the parties." This case, it has always been supposed, decided questions like that now

Mayhew *et al.*, vs. Graham and another.—1846.

before the court. It states the general rule, the reason of the rule, to guard the chastity of written contracts; and it afterwards sets forth the exceptions to the rule, within none of which was an attempt made to bring the case, now under consideration.

Starkie, in his work on evidence, is equally explicit: "Where written instruments are appointed, either by the immediate authority of law, or by the compact of parties, to be the permanent depositories and testimony of truth, it is a matter *both of principle and policy*, to exclude any inferior evidence from being used, either as a substitute for such instruments, or to contradict *or alter them*. Of principle, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit, than that which appertains to parol evidence; of *policy*, because it would be attended with great mischief and inconvenience, if those instruments, upon which men's rights depended, were liable to be impeached and contradicted by loose collateral evidence." 3 *Starkie*, 995. 1st *Am. Edit.* Oral evidence, he adds, shall in no case be received "to contradict, alter or vary a written instrument, either appointed by law, or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites; for, by doing so, oral evidence would be admitted in usurpation of a species of evidence, decidedly superior in degree," p. 996. Hence the observation of *Lord Tenterden*, (in *Vincent and Cole*, 1 *M. & M.*, 258:) "I have always acted most strictly on the rule, that what is in writing, shall only be proved by the writing itself." "The writing, says *Domat*, preserves unchanged the matters entrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves, that is by the inspection of the originals." See cases cited, *Broom's Legal Maxims*, p. 266.

Such, it would really seem, always has been deemed to be the law, and the reason of that law, in *England*, and from *England*, *Maryland* borrowed its law on this subject. This, it may be, is not in every respect the law in every one of our sister States, as will appear by the authorities collected in the

Mayhew, *et al.*, vs. Graham and another.—1846.

notes to *3rd Starkie*, 1009, and in *Norris' Peake*, 168. Other States, however, must be permitted to adopt such rules as they choose. It is the business of *our* courts to take care, that our law is not changed by different laws, and decisions, elsewhere.

It is thought, however, that advantage can be taken of this rule, only when the parties to the deed are the parties litigant, which is not the case here. But does this vary the law, as it was laid down in *Wesley and Thomas*? To say this, is to reverse that decision,—to say that the language used by the court on that occasion, did not express its meaning. To be sure, that was a case between the parties to the deed, out of which the controversy grew. But the court did not say that parol evidence could not be admitted in that suit, because, in that suit, the parties were parties to the deed, but because of a *general* rule; a rule that, in any case, parol evidence could not be received to contradict the deed;—to give it a meaning which its own words, without any interpolation, will not give to it, or to take from it, any portion of the meaning to be found in its words, unless the deed was impeached, and it was designed to prove, that there was something like fraud or mistake in or about it; and here was a deed to be construed, and no fraud, mistake, or surprise, was alleged.

The argument is, that the rule laid down in *Wesley and Thomas*, is a rule of which advantage can be taken only by one of the parties to it, in a controversy to which the parties to the deed are the parties. No such notion, I feel warranted in saying, can be found any where in the *Maryland Reports*. If we find it at all, it must be found elsewhere.

There is perhaps not a little danger, that in the prevailing fashion here, of referring to the decisions of courts elsewhere, although we may not, in strictness, make laws ourselves, for the good people of the State, yet we may make the courts and legislatures of other States, legislate for this State. This is an evil which “has increased, is increasing, and ought to be diminished.” There is, however, it is believed, no great danger of being thus misled in this case, if we will take the trouble to examine and correctly understand the cases. It perhaps may

Mayhew, *et al.*, vs. Graham and another.—1846.

be safely affirmed, that there are repeated decisions of the courts of *New York*, which, so far from sanctioning this notion, would teach us, that the law is quite otherwise. In the cases, *Dey and Dunham*, 2 *John. Ch. R.*, 182, and *Dunham vs. Dey*, 15 *John. R.*, 555. *Strong and Stewart*, 4 *J. C. R.*, 167. *James vs. Johnson*, 6 *John. C. R.*, 417. *Henry vs. Davis*, 7 *J. C. R.*, 40; and *Marks vs. Pell*, 1 *John. C. R.*, 594, it seems to be decided, that in the controversy between parties to the deed, parol evidence may be admitted to vary the terms of it; to prove that a bill of sale, absolute on the face of it, is in truth but a mortgage, and this in a suit between the party making the deed, and the person to whom it was made, the former alleging, that though a bill of sale, it was made to secure a debt, and asking leave to *redeem* property conveyed by a deed absolute on the face of it, and the defeasance resting in parol. In such a case, indeed, some such reasoning as this might seem to be admissible. The transaction is one between a creditor and his debtor, not between a vendor and vendee. The object of the parties was not the satisfaction of the debt, but merely to secure the eventual payment of it. To use that deed after it is obtained, not for the purpose for which the creditor professed to ask it, and for which, if the parol proof is received, it will show, that it was unquestionably designed, is an act of downright fraud in a mortgagee; in fraud of the agreement, and also in *fraudem legis*, which is peremptory, that no mortgagee shall, by any contrivance, deprive the mortgagor of his equity of redemption; “a fraud on the part of the defendant, a mortgagee, in attempting to convert a mortgage into an absolute sale.” 4 *J. C. R.*, 167. In this last case, *Chancellor Kent* said, that the authorities cited by him, “are sufficient to show, that parol evidence is admissible in such cases, to prove that a mortgage was intended, and not an absolute sale, and that the party had *fraudulently* perverted the loan into a sale.” Thus is made out a case of fraud, against which chancery will relieve. Same in *Va.* See 1st *Wash. R.*, 14. 1st *Hen. and Munf.*, 101.

In *England* it would seem, that such reasoning would not be entirely satisfactory to the court. See the cases in *Coote*; pp. 23, 24, &c., to show what is meant there by writers and

Mayhew, *et al.*, vs. Graham and another.—1846.

chancellors, when they say that “equity will admit even *parol* evidence,” to show that an absolute conveyance was intended by way of security only. Indeed *Chancellor Talbot*, (*Talbot’s Cases in Eq.*, p. 69,) condemned the practice which then prevailed in some parts of England, of taking an absolute deed, with a defeasance *separate from it*, saying, “to me, it will always appear with a face of fraud, for the defeasance may be lost, and then an absolute conveyance set up.”

Here it may be proper to remark, that the unfortunate case of *Wesley and Thomas*, is, in another respect, most strangely misapprehended. The court is supposed to have decided, that as the case was one between parties to the deed, and simply for that reason, either party was estopped, and could not, by *parol* testimony, prove, that although it was *intended to be a bill of sale in form*, the design was merely to secure the payment of a debt. That question, it is believed, the court did not choose, perhaps was not prepared, to decide. The decision was, that in that, and such like cases, “it is essential,” that the bill should charge fraud, mistake or surprise, to let in any *parol* proof. “It is essential on every principle of correct pleading, that that which gives jurisdiction to the court, should be distinctly and substantially alleged.” The bill in that case made no such charge, and for that reason, the court was not authorised to look at the *parol* proof, and, of course, could not have relieved, although there had been the most satisfactory evidence, that the mortgagor agreed to execute a mortgage; that the mortgagee wrote it, undertook to read it to the other, and in doing so, contrived so to *misread* it, as to make it a mortgage in express terms. That there was a defect in the bill, which was then, and in that court, incurable by the proof, though that proof had been all sufficient to establish a fraud. It would not appear, from the *New York and English Reports*, that the courts there deem such a charge in the bill to be so essential, as it was declared to be in the above named case, though in this we may be misled by their reporters.

We are now urged to make the court say, what certainly it did not say: to declare that to the general rule upon which reliance is placed, there are *four* exceptions; when the court said

Mayhew, *et al.*, vs. Graham and another.—1846.

there were but *three*; to add to the words which were used, some such words as these, “And unless the parties to the deed were not parties to the suit,” this would not be to “guard the chastity of the written” opinion, and for such violation of *its* chastity, we cannot find an apology in any evidence, parol, hearsay; or other, before us. And what would be the consequences of such an unauthorised interpolation? The rule would be entirely changed, and in place of the rule of common law, spoken of in *Wesley’s* case, what is there stated to be the general rule, is made to be an exception to it. Correctly written, it would be made to read thus :—Parol evidence is admissible to contradict or vary the terms of any written instrument, in all cases; except only when the parties to the deed are parties to the suit; and in those cases too, provided there be fraud, accident, or mistake !

It is not questioned here that the deed was admissible to prove the fact for which it was produced, to wit, that the absolute title to the vessel was in the defendants. It was offered simply to prove, and, if there be no interpolation made, it was proof conclusive, that on the day of its date the defendants became the absolute owners of the vessel, and that fact being established, the liability of the defendants was made out; unless indeed they could have proved, that afterwards, and before the purchase of the articles, the price of which is claimed in this suit, the defendants had disposed of the vessel. No attempt was made by the defendants below, to prove any such sale; but they insist, (and it is their only answer to the claim,) that this deed, although absolute in its terms, did not give them an absolute title; and they wished to be allowed to prove by parol evidence, an agreement or understanding between the parties to it; and which certainly is to be found no where in the bill of sale. This would be to violate the principle which is laid down in *Wesley and Thomas*, and which, we are told, is founded “on the wisest policy; it guards the chastity of written contracts against all interpolations.”

Indeed, to state the doctrine, is a refutation of it. It cannot be that the same individual, founding his title in each case upon the same written instrument, can insist, when a claim

Mayhew, *et al.*, vs. Graham and another.—1846.

against him is established by the deed, that the deed is not what it purports to be, and by parol evidence of this, defeat the claim; and yet, in a controversy between him and the person who executed the deed, at the same time, and although the testimony adduced in the other case, is now ready to be produced against him, may insist that the same deed, which he was allowed in the former suit to prove, was only a mortgage, is in this suit no mortgage at all, and thus defraud his creditors or his debtors. Yet such would be the inevitable consequence, confining the rule laid down in *Wesley's* case to controversies, between the parties to the deed.

This however, it is contended, is the law, and that it is to be found in the law of estoppel. It has not been discovered, that the law of estoppel has any thing to do with the case under consideration. This is an attempt by the party grantee, to impeach a deed executed to himself, and which he has accepted. He offers oral testimony, which he says will give the lie to his deed, and will prove the real truth in regard to his title, which his own, and only evidence of title, conceals, and misrepresents. Upon what ground is the introduction of this parol testimony, *for such a purpose*, resisted? Did the plaintiff rely on the law of estoppel? no such thing. It was insisted, that "only, the best evidence attainable, was admissible. "It is a fundamental rule of our common law, that oral evidence shall not be given, to add to, subtract from, or in any manner alter or vary, *any description* of written contracts. *Quoties in verbis, nulla est ambiguitas, nulla expositio contra verba fienda est.* This general rule or principle has been established, on the ground, that the writing stands higher, in the scale of evidence, than the oral testimony; and that the stronger evidence ought not, therefore, to be controled or altered by the weaker." *Addison on Contracts*, 158. Such is the rule, except when testimony is offered to invalidate the instrument in a contract which cannot be impeached, as in this case, is made and reduced to writing by the parties; the writing must speak for itself, and not be interpreted by witnesses, who may at the time have misunderstood the parties to the contract, or if they correctly understood their meaning at the time, may since have forgotten

Mayhew, *et al.*, vs. Graham and another.—1846.

it. *Verba volant, scripta manent*. This is the law, and would have been the law of this case, although no law in regard to estoppel, had ever been heard of.

The case of *Carroll vs. Norwood*, 5 H. & J., 164, was a controversy between two persons, one of them claiming indeed under the parties to a contract or grant, but the other, an entire stranger to it, and yet parol testimony to prove the intent of the parties, and the meaning of the written deed, was inadmissible.

It may sometimes be the case, that a deed is evidence for one party, and not admissible when offered in testimony by his adversary. "They alone," (the parties to the instrument,) "are to blame, if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons." 1st *Greenl. on Evid.*, sect. 279. See also 4th chap., of same author.

In the trial of this cause, a deed executed by another person, to the defendants, was offered in evidence. The first enquiry was, for what purpose was that deed offered? If admissible, and admitted for that purpose, it is to speak for itself; and if its meaning be doubtful, who is to say what is its import? What interest in the thing thereby transferred, passed to the vendee? The court, and in construing it, "the court are to regard, and be governed by the intention of the parties, to be collected from the deed, if not incompatible with some rule or principle of law."—"And nothing extrinsic or *de hors* the deed, is to be recurred to, in ascertaining such intention." *Carroll & Norwood*, 5 H. & J., 164. Except in the single case of a latent ambiguity, or unless the deed be impeached in a proper way, and by the proper person, for fraud, mistake, or surprise. Now, it cannot be pretended, that these defendants attempted to impeach this deed upon either of these grounds, or that there is in it any ambiguity, latent, or otherwise. "In such cases," we are told, in 1st *Greenleaf on Evidence*, sect. 277, "the duty of the court is to ascertain, not what the parties may have *secretly* intended, as contradistinguished from what their words express, but what is the meaning of the words they have used."

Mayhew, *et al.*, vs. Graham and another.—1846.

I adopt then, in reference to the question here, the language of *Ch. J. Tindal*, in *Attorney General vs. Shore*, 11 *Simons' Reports*:—"In such cases, evidence, *de hors* the instrument, for the purpose of explaining it according to the surmised, or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controled, and the clearest title undermined, if at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or the objects he meant to take benefit under, it might be set up to contradict, or vary the plain language of the instrument itself."

It is due to the question, which of itself is of importance to the community, and which derives additional importance from the circumstance, that an equal division of the court seems to leave this a doubtful question, after it had been decided in the case of *Henderson and Mayhew*, that some notice should be taken of it, in connection with the case of *Crawford's Adm's, vs. Brooke*, *ante*, 113.

This latter suit was brought upon an account alleged to be due from the deceased to *Hodges & Brooke*, and by them assigned to *John B. Brooke*, the plaintiff in the court below. The assignee brought the suit as assignee, and grounded his right to be the legal plaintiff in the suit, upon the act of 1829, chap. 51. In order to recover, it was necessary that the jury should be satisfied, that the deceased owed to the assignors the sum claimed, and that the claim was not barred by the statute of limitation; also, as the assignment of it. To prove the claim and a promise by the deceased, within three years before the institution of the suit, to pay it, he examined as a witness, *Brooke*, (one of the assignors and original creditors,) and by him proved the services, and the promise to pay, within the three years; and also proved the assignment. Supposing this to be all the proof required on his part, in order to show that he was, *bona fide*, entitled to his debt; and supposing that a *bona fide* assignment could mean in the case, nothing more

Mayhew, *et al.*, vs. Graham and another.—1846.

than an actual transfer, in the form used, of the debt, and not a contrivance by the aid of his own testimony, to recover money, which, when recovered, would go into his own pocket, the plaintiff, upon this proof, rested his case. Thereupon, the defendant below enquired of the witness, *quo animo*, he executed the assignment; and expected to prove by the answer, that it was executed and the debt transferred, for the purpose of enabling the witness to testify in the case, as before stated; and this proof the defendant said was offered, in order to show that the assignment was not according to the act of 1829. It appearing that the witness had no interest, whatever, in the event of the suit; and as the motives of the assignor could not affect the title of the assignee, to the money, (7 *Wheat.*, 566,) the court refused to direct the question to be answered, the answer having no tendency to prove what it was offered to prove, that the plaintiff was not *bona fide* entitled to the money for which the suit was brought. The case, then, was like a case of frequent occurrence in our courts, when a witness who has been examined, and has established the claim, is discovered to be interested as legatee, distributee, &c., and who for the declared purpose of being a witness, and proving the claim, releases, assigns, or transfers all his interest, and thereby makes himself a competent witness. The decision of the court then was, that as the witness had divested himself of all possible interest in the event of the suit, the question was inadmissible for the purpose for which it was put, but not that it was inadmissible for other purposes, such as to affect his credibility.

The exception then distinctly presents the question, whether this proof, if admitted, might not have shown, that by this assignment, which is required by the act of Assembly to be in writing, the plaintiff was, *bona fide*, entitled to the chose in action. This court reversed the judgment, but expressly upon the ground, that the answer, “which it must be assumed would have been given to the question, was material to destroy his competency, indeed, to avoid his assignment. The objection, it is added, was made by one who was injuriously affected by the assignment, upon the ground, that it was founded in fraud.” In another part of the court’s opinion, it is said, “it

Mayhew, *et al.*, vs. Graham and another.—1846.

was offered to prove, that the witness was influenced by considerations which would invalidate the instrument. Now if this court correctly understood that case, there can be no doubt that any person injuriously affected by the assignment, whether he be a party or a stranger to it, could offer proof to invalidate it. It is equally certain, that no two cases could be more unlike, than that case, and the one under consideration.

The counsel however, it seems, in support of the judgment of the court below, relied upon the principle, that parol testimony was inadmissible to contradict the written instrument. This, the court correctly observed, had no application to this case; in which the attempt was made, not to explain or contradict, but to invalidate the assignment. What is added, that the rule relied on by the counsel, is confined to the parties to the instrument, and does not extend to third persons, is inapplicable to the case before us; because in this case, the benefit of the rule is claimed by a third person, and it is a party to the deed, who denies that he ought to be affected by it.

It cannot be alleged, that in a case which is now to be noticed, the question under consideration was not expressly decided.

The case alluded to, will be found reported in 2 *Gill*, 393; and was against the same defendants, claiming of them a sum of money for articles furnished for the selfsame vessel as in this case, and on the selfsame ground, to wit, that these defendants were the owners of this vessel, *Harriet*. The proof of that ownership was the selfsame bill of sale, which is introduced into this case for the selfsame purpose; and the selfsame effort which is made in this, was made in that case, to defeat the claim by the introduction of parol evidence, to prove the bill of sale to be a mortgage. This parol proof was rejected in the court below, (by *Archer, C. J.*, and *Purviance, A. J.*), and this court upon an appeal decided that case, precisely as the court below decided this case,—that parol testimony for such a purpose was inadmissible,—though that case, like the present, was brought against one of the parties to the deed, by a person who was not a party to it, nor the representative of any party to it, or claiming under it. In expressing the opinion of the court in that

Mayhew, *et al.*, vs. Graham and another.—1846.

case, the following language was used:—"The appellants, after obtaining an absolute deed, and authorising the community to regard them as the owners of the vessel, cannot now, for their own benefit be permitted to allege, that their bill of sale is a mortgage. The party here, who is a stranger to the deed, insists, that it is what it purports to be; and the appellants, who accepted it, are precluded from offering the evidence on which they rely, in order to defeat the action against them."

Surely we cannot in this case, quarrel with the decision of the court below, and pronounce that there was manifest error in it, when that court learned this law from a decision of this court, in a case which differs in no respect from this, but in the name of the plaintiff, and the sum claimed.

Entertaining the opinion, that the plaintiffs in error claiming under this bill of sale, must upon this appeal be considered the absolute owners, and that they cannot in the manner proposed, shift from themselves any responsibility which the law says shall be the consequence of such ownership, I think this judgment ought to be affirmed; and now—

MAGRUDER, J., delivered the opinion of this court.

It has already been decided by this court, in the case of *Henderson and others*, and *Mayhew and others*, December term 1844, (and see also *Wyman against Gray*, 7 H. & J., 409,) that in the case of goods sold to an agent, if the principal be not known at the time of the sale, when he is discovered, he or the agent may be sued at the election of the vendor. In such a case, of course, the proof must establish, to the satisfaction of the jury, that the defendants were the owners of the vessel, and the plaintiffs were ignorant of it at the time of the sale. The several opinions of the court below, to this effect, are affirmed.

The plaintiff in the court below having offered in evidence a bill of sale, executed by *H. Boyle* to the defendants, conveying to them the vessel, for the repair of which, articles were furnished by the plaintiffs, efforts were made by the defendants below, to prove that the bill of sale was only intended as a mortgage. In these they were unsuccessful, and exceptions

Warfield, *et al.*, vs. Owens.—1846.

were taken to the opinion of the court. This court being equally divided in opinion upon these exceptions, the opinions of the court below are affirmed.

JUDGMENT AFFIRMED.

ELLEN B. WARFIELD AND OTHERS, vs. NICHOLAS OWENS
AND OTHERS.—*December* 1846.

The rents and profits of the real estate of a deceased debtor, whose personal estate is insufficient for the payment of his debts, and which accrued before a sale under a decree, at the suit of his creditors, is responsible in equity for their payment.

The heirs of the deceased debtor, or any other person receiving the same after his death, and before a sale, will, in equity, be considered as receiving the same for the benefit of such creditors.

Upon a proper bill filed for the recovery of such rents and profits, the receivers thereof will be made to account with the creditors of the deceased.

This accountability results from a clear principle of equity jurisdiction, that where the right is clear, and the law can give no adequate remedy, a court of chancery will relieve.

Where the accountability for rents and profits is established, a court of equity may, in a proper case, appoint a receiver thereof, or impose upon the tenant of the estate an occupation rent.

But where a bill seeks no relief out of rents or profits, and merely calls for a sale of the realty, in aid of the personalty, the latter being alleged to be insufficient, and the defendants deny the existence of the debt on which the bill proceeds, the insufficiency of the personalty, and plead limitations, and the proof taken did not establish such insufficiency, the complainants cannot ask either for an injunction to restrain unskilful cultivation, the appointment of a receiver, or an occupation rent.

To entitle a creditor, seeking to sell real estate for the payment of debts, to an order for injunction to restrain wasteful or unskilful cultivation, the appointment of a receiver of the rents and profits, before decree, or payment of an occupation rent, as against the widow and infant heirs of the deceased debtor, he must show, that it was necessary for his protection from loss, or that he had a right to demand it, because of the certainty or strong probability, that the real and personal estate of the deceased, would be insufficient for the payment of all the creditors of the deceased.

Fear and belief, unsustained by facts establishing their probability, or showing them to be well founded, are not a sufficient foundation for the interposition of a court of equity, by way of injunction, or for the imposition of an occupation rent.

Warfield, *et al.*, vs. Owens.—1846.

The real estate of a deceased debtor is not primarily liable for the payment of his debts; for that purpose, it is but an auxiliary to the personal fund, and is only answerable to creditors to the extent of the deficiency of the latter.

APPEAL from the Court of Chancery.

On the 26th February 1844, *Nicholas Owens*, *James T. Henderson*, and *Nicholas R. Warfield*, in behalf of themselves, and all other creditors of *Eli G. Warfield*, deceased, filed their bill, setting forth their respective claims against him at the time of his death, intestate, in the year 1841; that administration of his personal estate was granted to his widow, *Ellen B. Warfield*, and *Reuben Warfield*, who had possessed themselves of the said *E. G. W.*'s estate, and admitted the complainants' claims against him. The bill charged, that the deceased's personal estate will be insufficient for the payment of his debts, and that he was, at the time of his death, seized and possessed of valuable real estate, which descended to his infant children, *Frances E.*, *Susanna*, and *Magruder Warfield*; that the real estate, in the hands of his children, will be liable for the payment of his debts, in case of a deficiency of the personal estate for that purpose; that one of the notes of the deceased, mentioned in the bill, due to complainants, was given for the purchase money, of part of the land of which *E. G. W.* died seized, and is claimed by the assignee as a lien thereon, as for purchase money and interest. Prayer, for an account of the personal estate in the hands of the administrators, its application to debts of the deceased, and, in the event of its insufficiency, for a sale of the real estate for that purpose; for general relief, and for subpœna for the widow, administrators, and infant children of deceased.

The promissory notes described in the bill were exhibited with it.

The infants answered the bill, under commission, and did not admit its allegations.

The widow, *E. B. W.*, filed her answer, admitted the signature of the several notes, but denied they were ever obligatory upon her husband, and demanded strict proof of their consideration; and if founded upon value, they have long since been paid, &c. The answer also relied upon the act of

Warfield, *et al.*, vs. Owens.—1846.

limitations; that the complainants were indebted to the deceased. The alleged lien on the real estate was also denied; that the personal estate of *E. G. W.*, was far more than sufficient to pay his debts, &c.

The answer of *Reuben Warfield* admitted the bill, and consented to a decree.

On the 21st September 1844, the parties agreed to issue a commission.

On the 25th January 1845, the complainants amended their bill, to show, that two other of the notes mentioned in it, were given for the purchase money of land, of which *E. G. W.* died seized, which descended to his heirs at law, and in which his widow has a dower interest. Prayer, for relief, as before.

A commission was issued to take proof; much testimony was taken, which is sufficiently set forth in the opinion of this court.

After the commission was returned, *Nicholas Owens*, one of the complainants, filed his petition, alleging, that the real estate of the said *E. G. W.*, ever since his death, has been in the possession of his widow, the defendant, *E. B. W.*, who had cultivated the same in such an unskilful and wasteful manner, as greatly to lessen the value thereof; that he has reason to apprehend, that the same system of bad husbandry will be continued by the said defendant, unless restrained by this court; and further, that he has great reason for fearing, and verily believes, that said real estate, if now brought into market, would not sell for a sum sufficient to pay all the debts due by the deceased; and he is advised, that if the same cannot be now sold under the authority of this court, it should be placed in the hands of a receiver, to be managed or rented out for the benefit of the creditors of the deceased; or, if it is deemed expedient, to permit the said *E. B. W.* to retain possession, then, that an occupation rent should be assessed to be paid by her, and she ought to be restrained from cultivating the land, in a wasteful or unhusbandlike manner; and from wasting said land, or in any manner destroying or injuring the same, or cutting the wood or timber thereon, except for the necessary purposes of the said farm. That the commission heretofore issued for taking testimony, has been executed and

Warfield, *et al.*, vs. Owens.—1846.

closed, and is now about to be returned, so that the cause may be heard, in a very few days, upon its merits, if the defendants are so pleased; and your petitioner hereby submits, to hasten the hearing of the said cause, in order that its merits may be discussed on the hearing of this petition. Prayer, for a receiver, or an occupation rent, as suggested in this petition; and that an injunction may be granted; and for other relief.

Certificates were filed, to show that the course of cultivation pursued was improper, &c.

The defendant, *Ellen B. Warfield*, answered the amended bill; and also answered the petition, denying its allegations, and insisting upon her right of possession, and management and cultivation, without interference by receiver and injunction, and the more so in this case, as the creditors of *E. G. W.* had not established their claims. She denied the commission of waste, or intention to commit any.

The petition was ordered to be heard at March term 1846, and leave given to take further proof, upon the the usual terms, which was taken and filed.

On the 28th April 1846, the Chancellor, (BLAND,) ordered, that a writ of injunction issue, as prayed by the petition, and that *Ellen B. Warfield* be charged with an occupation rent for the said land, from the time of the institution of the suit, until otherwise ordered, or the sale of the said land, or it shall have been surrendered by her. The amount of the said rent to be adjusted by the auditor, from the proofs now in the case, and from such other proofs as may be laid before him.

From this order, the defendants appealed to this court.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By R. J. BRENT for the appellants, and
By T. S. ALEXANDER for the appellees.

MAGRUDER, J., delivered his opinion as follows :

I signed the decree which was passed by the court in this case, but not for reasons which will be found in an opinion which has been filed. The reasons, which are set forth in that

Warfield, *et al.*, vs. Owens.—1846.

opinion, for the decree, could not be my reasons for denying to the petitioner the relief which he sought; because, whether they exist in the case, I did not take the trouble to enquire; and because, if for such reasons the petition must be dismissed, then such an application could in no case be successful; for as soon as the chancellor ascertains that the complainants are creditors, and the personal assets are insufficient, he must proceed *forthwith* to decree a sale of the real estate. If such powers exist, it is obvious, that a case in which to ask for their exercise, never can arise:—a powerful reason for the conviction, that the court cannot, in such a case as this, appoint a receiver, or charge an occupation rent.

My reasons for dismissing the petition will be stated.

A simple contract creditor is entitled to all the relief, which the act of 1785, chap. 77, sec. 3, and its supplements, give to him. If the funds which the law of the land provides for the payment of the debts of a deceased person, (the personal assets and the proceeds of sale of real estate, devised or descended,) prove to be insufficient, the court of chancery can afford none other. If after the distribution of the real and personal estate, there yet remains a balance due to the creditors, they have, indeed, a right to that balance: but it is a right without any remedy, and must remain so until the legislature can provide some additional fund. To say that, if the two funds provided by the legislature proved to be insufficient, the court of chancery possesses jurisdiction inherent in it, or by virtue of any equitable maxim, to provide other remedies, to make the rents and profits a third fund for the payment of them, is to admit in that court the power of judicial legislation. The law may give to the courts power, and prescribe the mode in which that power may be exercised; or the latter may be omitted, because of existing rules, which will enable the courts to exercise the power. But if the power or right be such, “that according to their several modes of proceeding, neither of the courts, (common law nor equity,) can grant the proper redress, they cannot in any way supply the deficiency. Even upon *English* authority, a court of justice cannot be permitted, in any case, to legislate; and by the constitution of our republic, the three

 Warfield, *et al.*, vs. Owens.—1846.

departments having been directed to be kept separate, the judiciary has been expressly excluded from every species of legislation, and is precluded from supplying any omissions of the legislature, however obvious or necessary it may be, for attaining the object in view." 1 *Bland*, 47. It is true, indeed, that the time was, when, in *England*, very extravagant notions were entertained in regard to the court of chancery, and its own power to extend, according to the whim and caprice of its judge, its jurisdiction. "According to these notions," to use the language of *Blackstone*, "it would rise above all law, either common or statute, and be an *arbitrary legislature* in every particular case." Then it could find, in some of its maxims, which are often quoted without being understood: such as, "There can be no wrong without a remedy,"—the *germ* of all jurisdiction which it chose to usurp. "But this," *Blackstone* adds, "was in the infancy of our courts of equity, before their jurisdiction was settled."

That the court of chancery is not supposed, in *England*, to possess the power to supply defects in the law, under the pretext, that there can be no wrong without a remedy, and the court may, of course, provide one, if the law has omitted it, is shown by the cases spoken of by the commentator, in his *third volume*, p. 430 :—"Hard was the case of bond creditors, whose debtors devised away their real estate; rigorous and unjust the rule, which put the devisee in a better condition than the heir; yet a court of equity had no power to interfere." See the other cases there enumerated. The *hæres factus* then could not, in the court of chancery, or without express legislation, be made responsible for one cent of a debt of the testator, for the payment of which his *heirs*, to the value of the real estate which came to them from the debtor, were expressly bound. The devise could not be considered fraudulent against the creditor, although it was made, and had the effect to defraud him of one security, which he was supposed to have, for his debt. The courts were powerless, and a remedy for this hardship and injustice could only be given by parliament; and was given, for the first time, in 1691, (3 *Wm. and Mary*,) by a law, saying, that all devises should be void, as against creditors, and giving

Warfield, *et al.*, vs. Owens.—1846.

to them the same right of action against the devisee, as they had against the heir. “The chancery court,” says *Harrison*, (*1st Chan. Prac.*, 50,) “had been often attempting, before the statute, to make *the devisee* liable to specialty debts, but were not able to come at it; which was the occasion of the statute.” And speaking of an attempt to recover of the devisees, without making them a party, the opinion of the court is given: “It is the act of parliament which makes this assets in the devisees hands, and that requires the heir to be made a defendant. You must follow the remedy therein prescribed.”

Nothing of all this can be applicable to the court of chancery of *Maryland*; and it has powers and jurisdiction unheard of in *England* for centuries past, if, without any authority for it derived from the legislature, it can create an additional fund, (the rents and profits of the real estate, intermediate the death of the debtor, and the sale of his real estate,) to supply a deficiency which may exist, after the personal assets and proceeds of sale of the land have been exhausted. This cannot be maintained.

Much of the chancery system of our State, was, of course, borrowed from that of *England*; some little of it, it may well be thought, was, in the infancy of the colony, and its judicial system, no where to be found, but in the supposed wants, and local and other circumstances, of our people; in short, in what one of our eminent judges of other days called, “the common unwritten law of that court, *of domestic origin*.” Our statute book, however, clearly shows, that quite early,—years before the revolution—it was the settled policy of our State, to prevent any enlargement of the jurisdiction of the court, and even any change in its mode of proceeding, otherwise than by legislative enactment. How often this policy has been disregarded, not only occasional acts of legislation, but decisions of our courts, will evince. It is (to give one example,) deviated from, when modern treatises upon the practice of the court of chancery of *England*, as well as elsewhere, are introduced as the very best authority, to show what is the jurisdiction of, or the practice and correct mode of proceeding in, the chancery court of *Maryland*.

Warfield, *et al.*, vs. Owens.—1846.

Very much of the chancery jurisdiction which it is daily exercising, and with which we are most familiar, (the authority to sell the real estate of deceased persons, is a part of it,) is what the law books call, its “statutory jurisdiction;”—“A jurisdiction, which begins and *ends*, in acts of parliament.” 2 *Madd. Ch. R.*, 446. Of this portion of its jurisdiction, there is very much more in *Maryland* than in *England*. Now whatever may be said, of so much of its equity jurisdiction as was acquired, nobody can tell, when, or how; and whatever maxims it may have recourse to, in order to justify it in retaining and exercising, and occasionally adding to those branches of its jurisdiction, it is a settled maxim with respect to its statutory jurisdiction, that it ends where it begins, with the statute which confers it. It cannot pick up jurisdiction, because other courts which might rightfully have exercised it, have thrown it away; or bribe suitors to bring their claims *there*, by any promise, that it will afford them more *justice* than the law will allow them. It may exercise all that the legislature grants *to it*. But the grant of “an inch,” will not, under any circumstances, justify it, in taking “an ell;” or the most minute fraction more than is granted. The legislative and judicial departments must be kept separate and distinct. There can be no supplements to any of our laws, unless they are to be found in our statute book.

The act of 1785, then, which gives to chancery no jurisdiction, in the premises, except to sell the real estate of a deceased debtor, and distribute the proceeds of sale, gives to that court no more power to make the rents and profits of the estate sold, a further fund, for payments of the debts, than it would have had to decree the sale of real estate, for the payment of simple contract creditors, if the act of 1785 had never been passed by the General Assembly.

I am thus brought to the question, (one upon which, for years, the Courts of Appeals and chancery differed so widely; and which, at one time, was likely to produce most unpleasant results,) did the court of chancery possess, before the law of 1785, authority to sell real estates of deceased debtors, for the payment of their simple contract and other debts?

Warfield, *et al.*, vs. Owens.—1846.

The late Chancellor saw no such power granted by the act of 1785, and thought he must find it elsewhere. It was because of this opinion, that he was brought to the conclusion, that he had a right to decree an account of the rents and profits, to appoint receivers, fix occupation rents, &c.; and moreover, that it was not necessary for the creditors, in such a bill, to allege, or afterwards to prove, unless it was denied, an insufficiency of personal assets. If he was correct, in regard to the source whence was to be derived his authority to make real estate of deceased debtors answerable for their simple contract debts, it is undeniable that no such allegation or proof is necessary in bills of this description, and that the Court of Appeals has discovered some strange misconceptions of the law; but it would by no means follow, that he possessed the other powers, to appoint receivers, or decree an account to be taken of the rents and profits of the real estate, while enjoyed by the heir or devisee. The enquiry, however, now is, whence the jurisdiction of our court of chancery, to sell dead men's lands, to pay their debts?

There was a time, unquestionably, when the real estate of a deceased debtor, could not be sold to pay simple contract debts. Until 1785, there was no legislation, State or Provincial, which authorised such a sale. The power which our court of chancery had been exercising, without any doubt in regard to its existence for very many years, could not be borrowed from the chancery court of *England*, because, until very recently, no such power ever was possessed, or claimed by that court. How then could it be claimed, but in virtue of the act of 1785? The reasoning of the late chancellor, (one of whose orders is now under review,) is not to be found in the record before us, but in his own reports of his decisions, especially in the case of *Tessier and Wyse*, 3 *Bland*, 28. We have every thing that his powerful mind and extensive research could suggest, for the conclusions to which, (after an investigation more thorough than he, perhaps, ever gave to any other question,) he was brought. Before, however, stating the opinion of *Chancellor Bland*, it may be well to notice, what we can learn touching the opinions on the subject which had previously prevailed in

Warfield, *et al.*, vs. Owens.—1846.

his court. It will be found, that upon one point, (the jurisdiction of the court, independently of the act of 1785,) *Chancellor Hanson* ultimately adopted his opinion. In other respects, so far as we can judge, he differed with all our chancellors.

Our act of Assembly was passed in 1785, and *Chancellor Hanson* was appointed 1st October 1789; of course, but few cases arising under that law could have been disposed of before his appointment. In 1797, he said, that the court of chancery had never, *up to that time*, decreed the sale of the real estate of an *adult* heir or devisee, to pay the debts of a deceased ancestor, or devisor. Of course, it would seem that, he had no idea at that time, that the court possessed any power in such cases, other than that which the act of Assembly conferred upon it. It must have been then, doubtful in his mind, whether, if the heir or devisee was not an infant or *non compos*, the creditor of a deceased debtor had a remedy *in chancery*; whether that court had any power to decree for such a purpose, the sale of land which had descended, or been devised, to an adult; unless he was a *non compos*. It is certain, that, at that time too, a notion prevailed, to some extent, that creditors could sue *at law* the heir or devisee. Of this we have proof in *Preston vs. Preston*, 1 *Harr. and Johns.*, 366, decided in 1802; and *Lodge and others, vs. Murray's heirs*, 1 *H. & J.*, 499, decided in 1804. According then, to what seems to have been the then opinion of legal men, it might be that simple contract creditors had a remedy, although the land had descended, or been devised to one, who was neither an infant, nor *non compos*. No body as yet, it would seem, thought that he had any *in equity*, unless given by the act of 1785. Whether it existed at law, was to be decided in the case of *Preston and Preston*, and in that case it was decided, that “at law, the heir cannot possibly be answerable, unless sued *as heir*, and *unless he had promised to pay the debt*. This was again decided, (both of the decisions by the *General Court*,) in the case of *Lodge and others, against Murphy's heirs*. From either of these decisions there was no appeal, and it has ever since been considered, that they settled the law in *Maryland*; though it may be inferred from what they have left behind them, that neither

Warfield, *et al.*, vs. Owens.—1846.

Chancellor Hanson, nor *Chancellor Bland*, agreed with the *General Court*.

The first decision was at October term, 1802; and on the 23rd December 1803, *Chancellor Hanson*, in the case of *Tyson and others, against Hollingsworth and others*, was called upon to revise what seemed to be his opinion in 1797, that if the heir or devisee was an adult, unless he was *non compos*, the simple contract creditor had no remedy in equity, until further legislation in the premises. He states, that in one case "he had refused to execute the power," although the heir himself, the only person who had a right to object to its exercise, had expressed a willingness that he should exercise it. See *Chan. H's Opinion, 2 Bland, 328, note*. It is quite evident that he could not comprehend the subject, as it was presented to his mind by the decisions of the *General Court*. He concluded, "that he might have done wrong" previously, and thenceforth until his death, passed such decrees, and distributed the proceeds of sale, and then evidently supposed, that he had no further jurisdiction:—no power to take an account of the rents and profits.

Upon the death of *Chancellor H.*, two years afterwards, *Chancellor Kilty* was appointed, and it is known, that notwithstanding what had been the decision of his predecessor in the case just noticed, he had great doubts and difficulties touching this branch of the jurisdiction of his court; and after struggling some years to surmount them, he acted like a sensible man, in prevailing upon the legislature to cut the knot, which it had been so difficult to untie, by enacting, (1818, *chap. 193, sec. 3*,) that the provisions of the act of 1785 should be extended to defendants of full age. This, one might have thought, would prove a "statute of repose," and such it was for years. *Chancellor Kilty*, of course, was satisfied with a law, which it is believed he penned; and he was succeeded by *Chancellor Johnson*, who, when he found that our acts of Assembly gave him the jurisdiction which at any time he was called upon to exercise, was not over anxious to know, whether this court did not possess it, and might not have exercised it, without any act of Assembly.

Warfield, *et al.*, vs. Owens.—1846.

After the death of *Chancellor Hanson*, and until the death of *Chancellor Johnson*, it was the belief of chancellors and lawyers, that all the power which the court possessed, to sell the real estates of deceased debtors, to pay their simple contract debts, was conferred *and limited* by the act of 1785, and its numerous supplements, referred to in *Dorsey's Laws*, pp. 210, 211; and of the many hundreds of debtors, whose real estate was sold to pay their debts, and proved to be insufficient, there is not one instance, during all that time, of a bill being filed against the heir or devisee, to account for the rents and profits. The particular remedy was given by law, and it might well be thought, as *Chancellor Talbot* once said, that "it would be very improper, for a court of equity to take it up, where the law leaves it, and extend it further than the law allows."

When *Chancellor Bland* came into office, and this branch of the jurisdiction of his court was brought under his consideration, reading, perhaps, the opinion of *Chancellor Hanson*, before referred to, and being a man of great research and industry, and perhaps, rather over-anxious to find out, what could not be found out; and what, if it could have been found out, would have been of no value to a chancellor, he chose to know all about it. He took up the act of 1785, just as if it was a law recently enacted, and was yet, for the first time, to receive an interpretation, and was brought to the conclusion, that the meaning of the act of 1785, without any of its supplements, was entirely misunderstood, and that until the supplement of 1818, chap. 193 was passed, it did not authorise the court to pass very many of the decrees, which it had passed, to sell the land of adult heirs and devisees, for payment of the debts of those, from whom they claimed it. As, however, the power had been exercised so repeatedly between 1785 and 1815, the court, he thought, must have possessed it before the latter year, and it must have been a branch of its jurisdiction before 1785. The difficulty yet to be surmounted, was, to fix the time when, and the mode in which, this power, which his court had so long exercised, was acquired by it. The era ultimately fixed upon, was a day on which a statute of *George 2nd* passed, in 1732, (5 *Geo. 2*, chap. 7,) took effect. See that statute, 3 *Bland*, 305, note.

Warfield, *et al.*, vs. Owens.—1846.

Much might be said upon the subject, and perhaps, on both sides of it, if this was still to be regarded as *res nova*. At one time indeed, its jurisdiction was claimed, “inasmuch as an executor or administrator is suable in this court, on the ground of discovery, and land is, in this State, liable for all debts, as well as the personal estate.” But, in the first place, the creditors have no right to a discovery *in chancery*, unless they are entitled to relief, *somewhere*, at law or in equity; and we are yet to find out, when and how, or whether *at all*, they have any title to relief, by a sale of the debtor’s real estate. An answer to the notion, that the heir is suable in equity, because an executor is, on the ground of discovery, will be found in a decision by this court, (not reported,) that the executor is not suable in equity by a creditor, upon any such ground. The truth is, either the act of 1785, or the statute of *George 2nd*, just spoken of, give to chancery the jurisdiction, now to be ascertained; or a branch of jurisdiction, of which the court has been in the undisputed exercise for so many years, never was any part of its jurisdiction. The learned judge, whose order is now under review, denies that it can be found in the act of 1785, but maintains that it is conferred by the statute of *George*. Now it will not be alleged, that the act of Assembly cannot be read, without being understood to confer all the jurisdiction, which it was supposed, and it is thought to confer. Some change in the structure of some of its sentences, some transposition of its words, and perhaps the omission of some of its words, may be required, in order to give to it the construction which it would seem to have received; though after all, perhaps, less violence needs to be done to its language, than has been done to many sections of the statute of frauds, in order to ascertain what was intended to be its import. But as to the statute of *George*, alluded to, no transposition of words, no rules of *misinterpretation*, yet invented by the wisdom of man, will make that statute, in any way, beneficial to *simple contract* creditors of deceased debtors, or enable the court of chancery, to exercise any power whatever, in such cases. The relief which it gives is confined to judgment creditors, and authorises in satisfaction of their debts, a sale of land, *upon*

Warfield, *et al.*, vs. Owens.—1846.

which they already have a lien. The introduction of the words, “lands and tenements,” into the writ of *fieri facias*, immediately after the words, “goods and chattels,” it has been understood, was because of, and as far as the courts could execute it, a compliance with, the requisitions of the section of the statute, which it is now supposed, gave so much business to the court of chancery. Hence his decree in favor of the complainant, in the case of *Tessier and Smith, against Wyse*, in which there were adult defendants; in which the bill did not allege a deficiency of personal assets, and in which, certainly no such deficiency could be proved. From that decree an appeal being taken, it was reversed by this court. See 4 *G. & J.*, 295, and expressly for the want of the allegations and proof which was required by the act of 1785, and which no other law, statute or common, of this State, ever had required. So too in 6 *G. & J.*, 446, speaking of what is required by the act of 1785, “the exercise of such jurisdiction must be warranted, both by the pleadings and the proof, or the decree cannot be sustained.” It might well have been expected, that when the highest judicial tribunal had thus decided, there would have been an end to all the controversy that had arisen, or might arise, in consequence of the seeming obscurity in the act of 1785. If the words of the law, left its meaning doubtful, the interpretation of it, now given by the court of last resort, could not well be misunderstood. The act of 1785, gave to creditors who sought a sale of the real estate of their deceased debtor, the remedy, and the only remedy which they had, for if not the only remedy, how could it be necessary to allege and to prove, all that was required by that law, but by none other to be alleged and proved? That law states the relief which it is designed to give to creditors. The chancellor shall decree a sale of the land, to pay the debts. Surely there needeth to be a supplement to that act of Assembly, in order to give to the creditors another fund, in addition to those already provided. A sort of supplement to this act, is supposed to be found, not indeed in any thing in the form of an act of Assembly, but in the words, which in the case of *Curtis against Curtis*, 2 *Brown’s Chan. Cases*, 633, are ascribed to the then

Warfield, *et al.*, vs. Owens.—1846.

Master of the Rolls: “It is the practice in equity, that bond creditors, *coming for a distribution of assets*, shall have an account of the rents and profits, which they could not have at law. The law gives the creditor only the land *to hold*, until he is satisfied. Equity goes further and says, that if the remedy at law is not sufficient, we will sell the inheritance of the estate; and if that will not do, we will direct *an account of rents and profits against the heir*.” This was certainly an *obiter dictum*. They are words, supposed to have been uttered by the Master of Rolls, in the case of a widow suing for dower, and a claim, that the rents and profits to which she was entitled, should be decreed to her in that suit. Now we are reminded, by the quotation, that the law of *England*, and that of *Maryland*, is in some respects different. Land is *sold* here to pay debts, while in *England*, all that the creditor can usually claim, is a portion of the rents and profits, until thereby the debt is satisfied. Owing to this diversity, we may misunderstand what we sometimes read in the *English* books, about the creditors being entitled to rents and profits.

The law, however, is frequently stated in law books, as stated above by the Master of the Rolls; and generally, it may be noticed, upon the authority of that *dictum*, bond creditors may come into equity, and this to prevent a multiplicity of suits. Each creditor may sue at law, but to avoid this multiplicity of suits, they are permitted *in equity* to unite in one bill, and therein ask, a distribution of the real assets which descended to the heir.

We are sometimes referred to *Bacon's Abridgement*, *Accompt B*, as well stating “the gradual development of equity jurisdiction, in cases of tort, mesne profits, &c. There we are told, that chancery will not interfere in favor of *judgment* creditors, even to set aside a fraudulent conveyance, and to decree an account against the debtor and owner of the estate, nor in favor of a mortgagee against a mortgagor.

The question, in what cases the chancery court can decree an account of rents and profits, is one not free from difficulty; and no wonder, if it be true, as the books tell us, that the principle upon which courts of equity proceed in such cases, is the

Warfield, *et al.*, vs. Owens.—1846.

principle of *convenience*. No wonder then, if we sometimes are at a loss to ascertain its jurisdiction, the extent of it, or the principle upon which it is to be claimed. It would, indeed, seem difficult to prove, that a man who has no title, legal or equitable, to land, never was in the possession, or could rightfully demand possession of it, has any claim to rents and profits. In the case of *Strike and McDonald*, 2 H. & G., 191, it was said, that where there has been any fraud, an account of the rents and profits will be ordered. But that case furnishes no authority for the claim in this case, and the law would be absurd and unjust, if the heir should be made to pay rents and profits in a case like this, when, if he had been the debtor, had mortgaged the property to pay the debt, he is not accountable to the creditor for rents and profits which he has received, although the land furnishes an insufficient fund for the payment of the mortgage debt.

According to every view which I have been able to take of the subject, the chancellor erred in passing the order, because, in such a case, he has no right to decree an account of the rents and profits.

A further remark will be made. The court cannot have the power, because it could not possibly exercise it. No portion of it is to be exercised until the claims, and the insufficiency of personal assets are established; and these can be established, only by the decree, which appoints a trustee to sell the land. No order can be passed in regard to the rents and profits, *pending* the suit, because until a decree for the sale, and actual sale, and the ascertainment, that the real, added to the personal assets, do not pay the debts, the creditors have no right to file a bill, or petition, asking for any discovery, relative to, or on account of, the rents and profits.

DORSEY, J., delivered the opinion of this court.

The act of Assembly having made the real estates of deceased debtors, whose personal estates are insufficient for the payment of their debts, liable by a decree of the court of chancery, to be sold for the payment of such debts; should both real and personal estate prove inadequate to such payment, if rents, issues

Warfield, *et al.*, vs. Owens.—1846.

and profits of such real estates be, before the sale, received by the heirs of the deceased, or any other persons, the heirs or persons thus receiving, will, in contemplation of a court of equity, be regarded as having done so for the benefit of the creditors of the deceased. And upon a *proper bill*, filed for the recovery thereof, such receivers will be made to account to the creditors for the rents and profits by them received. This accountability results from a clear principle of equity jurisdiction, that where the right is clear, and the law can give no adequate remedy, a court of chancery will relieve. Upon the death of a debtor, whose real and personal estate are insufficient for the payment of his debts, the real estate in equity, is considered as appropriated to such payment; and its incident, the rents and profits, pass with it. That these views are not unsustained by the analogies of the law:—See 1 *Story Eq.*, 488, 512. *March vs. Bennett*, 1 *Vern.* 428. *Curtis vs. Curtis*, 2 *Brown's C. R.*, 633. *Hammond vs. Hammond*, 2 *Bland's C. R.*, 344.

The accountability in question being assumed, the power of a court of equity, when a proper case is brought before it, for the exertion of such a power, to appoint a receiver of the rents and profits of the real estate, or to impose upon its occupant an occupation rent, cannot be doubted. But does the record before us present a fit case for the exercise of such a power? is the question to be decided by this court, in reviewing the chancellor's order, from which the present appeal has been taken.

By the original and amended bill of the complainants, no such relief is sought; a sale of the realty in aid of the personalty, for the payment of debts, is all the relief, in respect to the realty, that is called for. The bill alleges, that *Eli G. Warfield*, the deceased, left a personal estate of large value, which came to the hands of his administrators, of whom the defendant, *Ellen B. Warfield*, was one, but that the personal estate is insufficient for the payment of debts. The defendant, *Ellen B. Warfield*, the mother of the infant defendants, by her answer denies, that the personal estate is insufficient for the payment of debts; denies the existence of the debts claimed; and pleads the statute of limitations in bar of their recovery.

Warfield, *et al.*, vs. Owens—1846.

After a great variety of testimony was taken by the parties, under a commission issued for that purpose, no part of which showed the insufficiency of the personal estate for the payment of debts, or that any other debts existed, other than those due to the complainants; and although the complainants had caused no audit to be made as to the personal estate, and had exhibited an inventory of the deceased's personal estate, appraised at the sum of \$4173.76, and had given evidence also of a debt of \$1000 due to the deceased *Nicholas Owens*, one of the complainants filed his petition, in the court of chancery, alleging, that the real estate of the deceased, ever since his death, had been in the possession of his widow, *Ellen B. Warfield*, who was cultivating it so wastefully and unskilfully, as greatly to lessen its value; and that he had reason to apprehend the same system of husbandry would be continued, unless restrained by said court; and "further, that he has great reason for fearing, and verily believes, that said real estate if now brought into the market, would not sell for a sum sufficient to pay all the debts due by the deceased." The petition also prays for the appointment of a receiver, or, in the event of its being deemed expedient to permit *Ellen B. Warfield* to retain possession, that she should be charged with an occupation rent; and that an injunction may issue, to restrain her from cultivating the land in a wasteful and unhusbandlike manner; and from wasting the land in any manner, or destroying, or injuring or cutting the wood or timber thereon, except for the necessary purpose of the farm. *Mrs. Warfield*, having filed her answer, denying all the material allegations in the petition, a great variety, of testimony was taken by the parties; and upon its return to the chancery court, the order of the 28th of April 1846 was passed, directing an injunction to issue as prayed for in the petition, and placing *Mrs. Warfield* under an occupation rent, to be adjusted by the auditor. From this order an appeal was taken by *Mrs. Warfield*, and the propriety of its passage, upon the proceedings and proofs before the chancellor? is the question which this court are called on to determine.

Warfield, *et al.*, vs. Owens.—1846.

After an attentive perusal of the petition, answer, and testimony taken in relation thereto, we are unable to discover any sufficient ground for granting the injunction, which has been ordered. And looking to the whole record, and the proofs therein contained, there is quite as little ground for the chancellor imposing, at the instance of the petitioner, *Owens*, an occupation rent upon the defendant, *Mrs. Warfield*. To entitle the petitioner to such an order, he must show, that it was necessary for his protection from loss, or that he had a right to demand it, because of the certainty, or strong probability, that the real and personal estate of the deceased, would be insufficient for the payment of his debts. Has this been done? is, then, the natural inquiry. It is true, that in his petition he has sworn, "that he has great reason for fearing, and verily believes, that said real estate, if now brought into the market, would not sell for a sum sufficient to pay all the debts due by the deceased." But fear and belief, unsustained by facts, establishing their probability, or shewing them to be well founded, are not a sufficient foundation for the interposition of a court of equity, by way of injunction, or the imposition of an occupation rent, in a case like the present. He who seeks such relief must show himself, in equity and conscience, entitled to it: that he has rights, which need, and deserve such protection. Is such the predicament of the petitioner? By his own proof he has shown, that the appraised value of the deceased's personal estate in the inventory thereof, was \$4173.76, and that one of the debts due to the deceased, which *Mrs. Warfield*, expected to receive and apply to the payment of his debt, was one thousand dollars; and that the value of the real estate was five thousand dollars. The amount of the debts claimed by the complainants, if fully established, is between three and four thousand dollars; and that there is now, or ever was, any other creditor of the decedent, the record furnishes no proof. In such a condition of this case what standing has the petitioner in a court of equity, when asking an injunction, and the assessment of an occupation rent, against the widow of the deceased, who lives upon the land of the deceased, and with the rents and profits thereof supports

Bevans vs. Sullivan, *et al.*—1846.

herself and his infant children. The real estate of a deceased debtor, is not primarily liable for the payment of his debts. For that purpose it is but an auxiliary to the personal fund; and is only answerable to creditors, to the extent of its deficiency. In the case, as now before us, upon the proofs in the record the personal estate appears to be sufficient for the payment of debts, and there is, therefore, no ground for the complainant's pursuit of the realty; much less for the injunction and occupation rent, which have been granted at the instance of the petitioner. And it is a fact somewhat remarkable, that the "fear and belief" of the petitioner, upon which the chancellor's order was founded, were not, that the real and personal estates, united, would prove insufficient for the payment of debts; upon which hypothesis, only, could the order of the chancellor be sustained; but that the petitioner "has great reason for fearing, and verily believes that said *real estate*, if now brought into market, would not sell for a sum sufficient to pay all debts due by the deceased." For aught that has been sworn to in that petition, the personal estate may have been amply sufficient for the payment of debts; and the petitioner may not have a semblance of right to pursue the realty.

This court will sign a decree, reversing the order appealed from, with the costs of this appeal to the appellant, and dismissing the petition of the appellee on which the order appealed from is founded.

ORDER REVERSED, AND PETITION

DISMISSED WITH COSTS OF APPEAL.

JOHN BEVANS vs. WILLIAM SULLIVAN, PETER RITNER, AND
THOMAS BEERS.—*December* 1846.

B filed his bill, charging a partnership, entered into between himself and three others, in a special business, by verbal contract; that it continued about a year, at the end of which time, he voluntarily withdrew, apprehending injury from the misconduct of his co-partners. The object of the bill was to procure an account, and payment over of his portion of the profits. One of the partners, in his answer, denied the existence of the

Bevans vs. Sullivan, *et al.*—1846.

partnership, and claimed that *B* was employed by him for hire. The two other partners admitted the partnership in their answers, and consented to an account. **HELD**, that the answers of the two who admitted the partnership, were not evidence against the third partner, who denied its existence. The general rule is, that the answer of one defendant is not evidence against his co-defendants.

The fact of the alleged existence of two partnerships, one of which was constituted of three persons, the other of the same three and another, will not make the answer of one of the three admitting the partnership, evidence, *as a partnership act*, against his other two partners, and thus establish the existence in fact of the partnership between the four, against the denial in the answer of one of the three partners. Such a state of facts does not make an exception to the general rule.

When one partner is permitted by his answer to testify against a firm, of which he is a partner, it ought to be, because he is testifying against himself, as a member of the firm.

Difficulties to be encountered in stating accounts, are no grounds why accounts ought not to be decreed, where the court perceives they are necessary to the rights of the parties, and ends of justice.

Every reasonable presumption will be made against those partners, whose fault it is that the books of accounts of a partnership are imperfectly kept; and if they claim to be entitled to other credits than those to which the books, at the close of the partnership, entitle them, it is usual to require of them very strict proof.

Circumstances stated, under which a court of equity will infer the existence of a partnership, in opposition to an answer denying it.

Where a bill alleged a partnership to have commenced and terminated at a particular day, and the proof established its commencement, a partner who insists that it was dissolved at an earlier period than that alleged, will have to prove it.

For personal services rendered by a partner, no compensation can be claimed, without proof of an express agreement, that he should be compensated for them.

APPEAL from the Equity side of *Allegany* county court.

The bill in this case was filed on the 29th September 1841, by the appellant, and stated, that on 1st September 1840, *John Bevans* and *Thomas Beers*, *Peter Ritner* and *William Sullivan*, entered into a verbal agreement, to become co-partners in the butchering business, in equal shares as to profit and loss; that it was agreed, that *J. B.* should be the active partner, should erect a slaughter house, buy and butcher the cattle, sell the meat, and collect the proceeds of all sales, *except to the partners*; that in consideration of the extra services, he was to

Bevans vs. Sullivan, et al.—1846.

be allowed, in addition to his share of the profits, the usual per diem wages to a person engaged in such business, and also a fair compensation for the hire of his carryall and horse, which were to be employed about the business of the company; that the business commenced on the 1st September 1840, and was conducted by the partners with success to the 25th September 1841, when said partnership was dissolved; that the said *J. B.* discovered that his confidence was misplaced, that his partners were combining to defraud him of his just share of the profits, and were aiming to force him out of the business, with no other than daily wages; in consequence of which he notified his partners, and the public, of his voluntary withdrawal from the business, and called upon his partners for a settlement, according to their agreement, which they refused. The bill then proceeded to set forth the nature, character and extent of the co-partnership business, amount of profits made, and the possession of the books of accounts of the concern, withheld by the appellees; that his co-partners are largely indebted to the concern as purchasers. Prayer, for answers, an account, subpœnas, and for general relief, against the aforesaid appellees.

William Sullivan answered the bill, and denied any partnership with the parties, or either of them, as mentioned in the bill, and alleged, that he hired the complainant, *J. B.*, to work and carry on the butchering business for him, *W. S.*; that he furnished the capital, and the business was carried on for his sole risk, by his means, and for his use. The said *W. S.* admitted a partnership between him and *Thos. Beers* and *Peter Ritner*, in a contract with the *Baltimore and Ohio Rail Road Company*, but denied they were interested in the butchering business with him. The special manner of conducting the business relied on in the bill, &c., were also denied, and also all fraud and combination.

The answer of *Peter Ritner* admitted the alleged partnership in the butchering business, and the contract alleged in the answer of *W. S.*, between him, *P. R.*, and *T. B.*, with the *Baltimore and Ohio R. R. Co.*, for the construction and completion of the *Doegully* tunnel, that it was commenced in 1839, and completed in 1842; that owing to the extent and

Bevans vs. Sullivan, et al.—1846.

importance of that contract, it became necessary that they should have connected with their work a separate butchering establishment, which led to the formation of the partnership for that object between the four, of the profits of which the complainant was to have *one-fourth*. This answer then proceeded to set forth the manner of conducting the partnership, for the purchase, slaughter, and sale, of cattle and meat, &c.; that the business yielded profits; that complainant had conducted himself faithfully; and that an account ought to be taken.

The answer of the other defendant, *Thomas Beers*, was substantially like that of *Peter Ritner*.

A commission was issued and a great variety of proof taken.

On the 13th October 1845, *Allegany* county court, (MARTIN, C. J.,) decreed as follows :

The bill in this case is filed against *William Sullivan*, *Thomas Beers* and *Peter Ritner*, in which the complainant charges the existence of a parol partnership in the butchering business, between himself and the defendants. Two of the defendants, *Thomas Beers* and *Peter Ritner*, admit the co-partnership, as alleged in the bill; but it is denied by *William Sullivan*, and the controversy is between the complainant and this defendant. It is clear, that the answers of *Thomas Beers* and *Peter Ritner*, cannot be used against *William Sullivan* for any purpose. It is an established principle of evidence, that the answer of one defendant cannot be read in evidence against a co-defendant. If the complainant was interested in establishing a fact by the evidence of a co-defendant, he might have examined him as a witness, on interrogatories, and the witness would then have been subject to the cross-examination of the other defendant. To withhold from such defendant the privilege of cross-examination, would be unjust, and this injustice must necessarily follow from the practice, of permitting the answer of one defendant to be read in evidence against a co-defendant. This is the language of the Court of Appeals, in the case of *Hayward against Carroll*, 5 H. & J., 520, subsequently adopted by the same court, in *Jones against Hardesty*, 10 G. & J., 415, I therefore put entirely out of view the answers of *Beers* and *Ritner*.

Bevans vs. Sullivan, et al.—1846.

A very different character has however been assigned by the law to the answer of *William Sullivan*. It has been made evidence by the complainant, and being responsive to the bill, must be received as true, unless contradicted by two witnesses, or one witness, with corroborating circumstances. This defendant has denied the existence of any partnership as charged in the bill; and an answer thus positive, and responsive, in its averments, in reference to a matter within the personal knowledge of the party, can only be overcome by strong and clear proof. The question is, has this answer been disproved? In my opinion it has not.

I do not consider it necessary to enter into an extended view of the conflicting and irreconcilable evidence taken in this cause. After a careful examination of the testimony, I am satisfied, that a partnership, as alleged by the complainant, has not been proved. The bill therefore must be dismissed.

An appeal from that decree was prosecuted by the complainant below.

The cause was argued before ARCHER, C. J., DORSEY, SPENCE and MAGRUDER, J.

By PRICE and McMAHON for the appellant, and
By McKAIG and SCHLEY for the appellees.

MAGRUDER, J., delivered the opinion of this court.

On the 29th September 1841, the appellant filed his bill of complaint against the three defendants, charging, that on or about the first day of September 1840, the four entered into a partnership in the butchering business; each to have an equal share of the profits, and to bear an equal share of the losses: the complainant to be the active partner in the business. By the terms of the agreement, which was a verbal one, the appellant was to be compensated for his services, and for the use of his horse and carryall, to be employed about the business of the co-partnership. It is charged, that the business was commenced on the 1st September 1840, and was continued until the 25th September 1841, when, for the reasons stated in the bill of complaint, the partnership was dissolved by himself, and the

Bevans vs. Sullivan, et al.—1846.

defendants when called upon, refused to settle the partnership business.

The bill prays, among other things, that an account may be taken of the business of the partnership.

Two of the defendants, *Beers* and *Ritner*, admit a partnership, as stated in the bill of complaint, and consent that an account be taken, as asked.

The other defendant, *Sullivan*, denies that any such partnership ever existed, and insists, that the butchering business, during the whole period, was carried on with his funds, and for his own individual profit, and that the complainant was employed by him, and to receive wages.

Much proof was taken by the parties, and the case having been submitted, *Allegany* county court, setting as a court of equity, dismissed the bill of complaint. From that decree an appeal was taken, and thus is presented for our decision, the question, whether the complainant is not entitled to an account? or in other words, is a partnership proved to have existed between the parties in the butchering business, as charged by the complainant?

Testimony of various descriptions is relied on by the complainant, to prove the partnership. Among other things, it is insisted, that the answers of *Ritner* and *Beers*, the co-partners of the other defendant in a different concern, are evidence against that defendant, and this because, it is said, the firm of *Ritner, Beers and Sullivan*, contributed three-fourths of the capital, and were entitled to three-fourths of the profits in their partnership character; in other words, that it was a partnership consisting of two parties, the firm of *Ritner, Sullivan and Beers*, being one of them, entitled to three-fourths of the profits, and to contribute three-fourths of the capital; and the complainant was the other partner, to contribute one-fourth of the capital, and receive one-fourth of the profits.

It is not deemed necessary to inquire, at this time, whether this be a correct account of the partnership, it being the opinion of the court, that if such appeared to be the fact, still the answers of *Beers* and *Ritner*, filed in this case, would not be evidence against their co-defendant. The general rule, unques-

Bevans vs. Sullivan, et al.—1846.

tionably, is, that the answer of one defendant is not evidence against his co-defendant: and this is said to be a strict rule. The reason assigned for it is, that there is no issue between the parties, and no opportunity existed for a cross-examination. Exceptions have indeed been made to this rule, and in a few cases, the answer of one partner has been used as evidence against the others. The case before us, however, ought not to be admitted among the exceptions. The question between these four individuals is, whether a business which is regarded as profitable, was carried on by the four in partnership, or by one of them only, and for his exclusive profit. The other defendants have an interest in direct conflict with that of *Sullivan*, and their admissions would be for their own benefit. They might have been complainants in this case, and if they had united with the appellant in this application, there would have been as much propriety in contending, that the statements in their bill being the declarations of the partners of *Sullivan*, in the other firm, would be evidence against him.

It can scarcely be contended, that in answering this bill they are acting within the scope of their authority, as partners of the older firm.

The answers of the two, indeed, are not offered as evidence against the other defendant, because they are the answers of co-defendants, but, because they are declarations and admissions of co-partners. If for this reason such declarations were admitted as evidence, then the unavoidable consequence would be, that every thing in relation to the second co-partnership, which the defendants, (*Ritner* and *Beers*,) introduced into their answers, whether responsive or not to the bill, would be evidence for themselves, by being evidence against *Sullivan*, who is denying that they have any interest in the profits of the butchering business.

When one partner is permitted by his answer to testify against a firm, of which he is a partner, it ought to be because he is testifying, not for, but against himself, as a member of that firm. In this case, however, it is asked, that they be permitted to testify for themselves as well as for the complainant.

Bevans vs. Sullivan, et al.—1846.

It is insisted however, that if the answer of *Beers* be not evidence against *Sullivan*, for the reason already noticed, the declarations of the former are evidence against the latter, because of a combination or conspiracy, to which they were parties at one time, to defraud the defendant *Ritner*, and the appellants, of their share of the profits of the concern.

Granting the combination with such intent to be proved:—“Every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common objects, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against them. * * * * Care must be taken that the acts and declarations thus admitted, be those only which were made or done *during the pendency of the criminal enterprise, and in furtherance of its objects.*” 1 *Greenleaf on Evid.*, sec. 111.

If, in deciding the question now submitted to us, it was necessary to ascertain which of the declarations of *Beers* are, by this law, made evidence against *Sullivan*, some difficulty would arise. It may be said with confidence, that the appellant cannot claim the benefit of any admission in *Beers*' answer. If the conspiracy alleged once existed, this answer certainly was not prepared “in furtherance of its objects.”

The view, however, which is taken of this case, will render it unnecessary to discuss this part of it, and it will be dismissed with the observation, that the defendant, *Sullivan*, cannot be allowed to set off those declarations of *Beers*, which, if admitted as evidence, would prejudice the claim of the appellant against those of a different character, on which the latter may have a right to rely.

The defendant, *Sullivan*, admits, that the butchering business was carried on, but denies the partnership, and insists, that the others were too poor to contribute the necessary funds. Upon this, and the probabilities of the case, we have listened to much discussion, and have been furnished with many references to the books of the business.

It has not, however, been shown to the court, that this business, conducted as it was, required any considerable amount of capital. The sales were rapid, the profits, it is quite reason-

able to suppose, were considerable, and *Sullivan* himself was generally in the receipt of the funds, which were from time to time to be employed in the purchase of other cattle, which were to be sold to the workmen employed by the older company, and for the proceeds of sale that company was responsible. Other proof than that which has been furnished by *Sullivan*, and the entries in the books, would be necessary, in order to prove that monied men only could engage in this business.

The want of capital is the reason assigned, why not only the appellant, but the other defendants, could not have been partners in the butchering business. Surely, if they had capital sufficient to be members of the company, to which the name of the *Doegully Company* has been given, we cannot take it for granted, that they could not procure the requisite capital to undertake the business of supplying with food the men whom they employed, and whom they were obliged to pay, in goods and in meat, or in money.

It has been urged as an objection to the relief which is sought, that the books were so kept that the accounts cannot be stated. The proof of the first cost of the articles, we are told, is not to be had, and there is nothing to show the amount of the expenses;—all this may prove, that the difficulties to be encountered in stating the accounts, will be unnecessarily great. Every reasonable presumption will be made against those whose fault it is that the books are so imperfect, and if they claim to be entitled to other credits than those to which the books, at the close of the partnership, entitle them, it is usual to require of them very strict proof.

In the course of the argument, it seemed to be conceded by the counsel for the appellees, that there was some evidence to be found in the record, that the parties, at one period, contemplated a partnership; something is proved which could not have existed, if the parties who composed the elder firm, at one time had not designed to form a partnership in the butchering business. There is testimony to that effect. It was evidently thought, that it would be of advantage to the firm of *Ritner, Sullivan and Beers*, to supply the workmen with meat; and it is also evident, that in their opinion, in order to

Bevans vs. Sullivan, et al.—1846.

form a partnership for this purpose, it was necessary to introduce into it, as a partner, a fourth person, to be the active partner in the business, and that person to be a butcher. Hence the application to *Johnson*, to whom no proposition was made to become the agent of the other firm, at any fixed salary, although they failed in their effort to induce him to become a partner, and receive a portion of the profits of the business. It appears also from the testimony of *Johnson*, that *Sullivan* and *Beers* had, previously to the fruitless negotiation with the witness, had either made proposals to, or received proposals from, the appellant. It may also be inferred from the testimony of this witness, that they would have preferred him as a partner to the plaintiff, if the former would become a partner, upon as favorable terms as those which had been offered by the latter.

In this testimony, however, it is said, there is something inexplicable:—one agreed to take one-half of the profits, the other, it is true, proposed to take only one-fourth, but he was also to be compensated for his services, and for the use of his horse and carryall; and the compensation to be claimed for his own services, and the use of the carryall and horse, added to the one-fourth, exceeded, it is supposed, the portion of the profits, which, if offered to him, would have induced this witness to be a partner.

Of this there is no proof, and besides it does not appear that the witness owned any horse or carryall, or, if he had, that the company was to have the use of them without making compensation therefor. We infer from what is said of the horse and carryall of the appellant, that the company would occasionally want to use a horse and carryall; that the appellant had those articles, and if he became a partner in this new business, he might thereby secure considerable employment for his horse and carryall. But there is no proof to warrant the belief, that by any agreement between the appellant and the defendants, the appellant was bound either to keep a horse and carryall during the existence of the partnership, or, if he had them, would not be at liberty to employ them elsewhere, when they could be employed elsewhere, with greater profit to their owner.

We have then in the deposition of this witness, satisfactory proof that *Sullivan*, as well as *Beers*, wished to have a slaughter house, for the accommodation of the workmen in the service of their company; that they designed to have a considerable interest in that business, but in order to engage in it with the greatest advantage, it was of importance to secure a fourth person, and he a butcher, not to be engaged as an agent, with a salary, but as a partner, to perform the services to be required of him for a certain portion of the profits. We have proof, that two of the partners, (*Sullivan* one of them,) were at one time in treaty with the witness, (*Johnson*,) acknowledged, that they had already been treating with the appellant, and that the terms upon which he would become a partner, were more favorable than those to which the witness would accede. They separated from the witness without, as far as we can learn, applying to any other person, and shortly after the failure of the negotiation with *Johnson*, we find the appellant in the place; and performing the duties of this fourth partner. All of this appearing in the case, surely very little more proof is necessary to satisfy us, that after the negotiation failed with *Johnson*, the defendants secured the services of the appellant; and upon the terms already suggested, it not appearing that the appellant ever consented to be that fourth partner, upon any terms less favorable to himself, than those on which he had previously offered, to associate himself with the defendants in the butchering business. But little more proof is wanted to establish the partnership, and for this proof we need only to refer to the depositions of *James Mullin*, *Leonard Moore*, and *Peter Lyons*, and the admissions and declarations therein proved to have been made by *Sullivan* himself.

It is true, indeed, that there are some declarations, which witnesses tell us, were made by the appellant, leading to a different conclusion. But in answer thereto, it may be said, that there existed reasons why the appellant wished his creditors to remain ignorant of his interest in the firm, and remain under the impression, that he was employed by the month or year. Upon these declarations, and the credit due to the witnesses who speak of them, it seems to be unnecessary now to

Dolan and Foy, vs. The Mayor & C. C. of Baltimore.—1846.

insist, as they can be used rather to prove that the partnership did not continue, as long as the appellant alleges, and not that it was not formed.

The conclusion, then, to which all this testimony brings us, is, that a partnership once existed between the appellant and the three defendants, and was commenced in September 1840. For what length of time it was continued, it is unnecessary to decide, until the auditor makes his report. Of course it is for him who denies that it continued as long as the appellant alleges, to prove that it was dissolved at an earlier period. The account ought to be ordered, and in taking it, it will be necessary to report upon the claims of the creditors, and among these will be placed the claim, if any such is established by the appellant, for services, and the use of his horse and carryall, this being the claim of the individual against the firm of which he is a member, and depending for its amount upon the time that the company had them in its service. For personal services rendered by a partner, no compensation can be claimed, without proof of an express agreement, that he should be compensated for them.

The court will sign a decree, reversing the decree of the court below, establishing the partnership, and the commencement of it, as above stated, and remanding the case to *Allegany* county court, sitting as a court of equity, in order that an account of the partnership transactions may be taken, and a final decree be passed, according to the proof now in the case, and such further testimony as may be authorised to be taken.

DECREE REVERSED WITH COSTS.

JAMES DOLAN AND PETER FOY, vs. THE MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.—*December* 1846.

In June 1783, the owner in fee of a square of ground in the city of *Baltimore*, conveyed it to trustees to erect a *R. C.* church, and lay out a place of burial on the same, for the use of the *R. C.* of the said city. The deed declared, that if the trustees did not build, erect and complete the said church, and appropriate the residue of the square in laying out a burial

Dolan and Foy, vs. The Mayor & C. C. of Baltimore.—1846.

ground for the use of the said persons, then it should be void, and the reversion in the grantors. No church was erected on the lot; but a church was erected by the same society of christians, upon a lot in the neighborhood, and the square conveyed, was used exclusively as a place of sepulture. The corporation of *Baltimore* paved the streets adjacent to the square; claimed the cost thereof as a paving tax, and to sell the square, in consequence of its non payment for their re-imbursement, or that of the persons who had paved the streets. Upon a bill filed by the pastor of the church actually built, and by one of its congregation, who, with others of that church, and its persuasion, had used the square as a place of burial from 1783, hitherto, for an injunction to restrain the proposed sale for taxes. **HELD**, that neither of the complainants had any interest, legal or equitable, for the protection of which they could claim the interposition of a court of equity.

If the conditions of the deed have not been performed, the whole estate, legal and equitable, will have reverted to the heirs of the grantor, unless the heirs of the surviving trustee can allege and prove, in a court of equity, such positive agreement on the part of the grantor, or his heirs, or such specific acts of the parties, with distinct knowledge of the grantor, or his heirs, amounting to evidence of such an agreement as would entitle the claimants, by a bill for specific execution of such agreement, to a deed of conveyance, discharged of the condition so violated.

Trustees have no power to alter the nature and object of the deed appointing them, and under which they derived their powers, nor to dispense with the exact performance of the conditions imposed upon them: neither has a court of chancery such a power.

If a grantor is competent to make a conveyance, to the uses expressed in a deed, he is equally competent to provide for the restoration of the property to himself and his heirs, on the failure of the grantees to apply it to the purposes of the grant.

APPEAL from the Equity side of *Baltimore* county court.

The Reverend James Dolan and Peter Foy, on the 31st August 1846, filed their bill, alleging, that on the 23rd June 1783, *William Fell* conveyed in fee to *Thomas Russell*, *John Kirwan*, and *Robert Walsh*, as joint tenants, a square of ground in the city of *Baltimore*, in trust, to and for the use, behoof, benefit and advantage, of the *Roman Catholics of Baltimore town*, thereon to build, constitute and erect a church or chapel, and to lay out a burying ground, for the property and advantage of the said *Roman Catholics of Baltimore town*; that the said *R. W.* survived his co-trustees, and afterwards departed this life, leaving *R. W.*, his eldest son and heir at law, who

Dolan and Foy, vs. The Mayor & C. C. of Baltimore.—1846.

resides out of the State of *Maryland*; that *W. F.* hath also departed this life. The bill further alleged, that from the time of the execution and delivery of the deed hitherto, and with the knowledge, consent and approbation of the said *William Fell*, in his lifetime, and of the said trustees, during the lifetime of the said parties, respectively, the said lot of ground has *been used as a burial ground*, and only so used for the bodies of such persons, citizens of the said town, as died members of the *Catholic Church*; that the lot continues to be so used from time to time as occasion may require, and is used for no other purpose, and since the erection of *St. Patrick's Church*, the use of said burial ground has been confined to the congregation of that church; that *Peter Foy* was a resident of *Baltimore*, and a member of the *Catholic Church*, before and at the time, of the date of the deed, and still is so; that *James Dolan* is a priest of the *Catholic Church*, residing in said city, and pastor of *St. Patrick's Church* aforesaid; that confiding in said deed and in the intentions of the parties thereto, the said *Peter Foy* hath buried various members of his family in said ground, and said *James Dolan*, as pastor aforesaid, hath authorised and permitted many members of the *Catholic Church* to be there buried by their surviving friends; that shortly after the execution and delivery of the said deed, the members of the *Catholic Church*, residing in the eastern part of the said city, determined to build a church in which to worship, according to the faith and discipline of their church, and with the knowledge, consent and approbation of the said *R. W.*, survivor aforesaid, and with the knowledge, and without objection from the heirs of said *Fell*, who was then deceased, determined *to erect and build the said church on a lot of ground at the north-east corner of Bank and Market streets, Fell's Point, and to retain and use the said lot so conveyed by the said Fell to the said R., K. and W., as and for a burial ground for the congregation of said church; which church was afterwards so erected, and is still used by the said congregation, and is known as St. Patrick's Church.*

The bill further alleged, that in the year 1845, *The M. & C. C. of Baltimore*, in pursuance of the power and authority

Dolan and Foy, vs The Mayor & C. C. of Baltimore.—1846.

vested in said corporation, determined upon the paving, and actually did pave, *Wolfe* street, along and in front of said burial ground, and for a considerable distance north of *Dulaney*, now *Baltimore*, street, and south of *Smith*, now *Lombard*, street; that said corporation and their collector of taxes have made claim upon the said lot of ground for its proportion of the costs of paving, and have threatened to enforce such pretended claim by a sale of the said burial ground; that as a burial ground, it is, and ought to be, exempt from such tax and claim, and all manner of taxation by said corporation, Prayer, to restrain the sale, for subpoena, and for injunction.

On the 31st August 1846, PURVIANCE, A. J., of *Baltimore* county court, ordered an injunction.

The appellees and their collector, answered the bill, and set forth the proceedings under which the paving was ordered to be done, and how this claim accrued; the non-payment of the paving tax, and the liability of the square therefor; that no distress remained upon the premises to pay the tax, and that the collector was about to sell for reimbursement, when the injunction was served upon him, &c. The answer admitted the deed of trust; that no church or chapel had been built thereon, and the use of the lot as a place of burial, by the *Roman Catholics* of *Baltimore*; that the heirs of *Fell* had permitted the use of the lot, as alleged; that there is now no person or corporation, who, as legally entitled to the said lot, could be sued at law.

The deed referred to, of June 1783, after conveying the legal estate, and describing the property as commencing at the north-east corner of *Wolf* and *Dulaney* streets, as stated in the bill, declared it to be in trust—

“For the use, behoof, benefit, &c., of the *Roman Catholics* of *Baltimore town*, thereon to build, construct, and erect a church or chappel; and to lay out a burying ground for the property and advantage of the said *Roman Catholics* of *Baltimore*, and for no other use whatever; and that if the trustees, &c., do not build, erect, and complete the said church or chappel, on the land aforesaid, and appropriate the residue of the same in the laying out a burying ground for the intent and purpose of the *R. C.* of *B. town*, then and in such case, this indenture,

Dolan and Foy, vs. The Mayor and C. C. of Baltimore.—1846.

and every part thereof, shall be void, as if the same had never been made and executed, and the reversion and remainder of the land and premises hereby bargained and sold, to be and remain to the said *William Fell*, his heirs," &c.

The printed ordinances of the *City of Baltimore* were to be read at the hearing, by consent.

Upon a motion to dissolve the injunction, *Baltimore* county court, (LE GRAND, A. J.,) delivered the following opinion:—

The question presented to the court for its decision, is embraced within very narrow limits. It is, whether grave yards are liable to the costs of paving streets on which they bind?

It is supposed they are exempted from charges of every description, imposed by the law of the State, and the ordinances of the city.

An examination of the various statutes of this State, discovers a uniform policy to exempt them from all public taxes; and the question is, whether this exemption operates as against the impositions of *Ordinance, No. 47*, entitled, "An ordinance to appoint city commissioners and port wardens, and to prescribe their duties?"

The 18th section of this ordinance provides, that "Whenever it shall be determined to pave any unpaved street, lane or alley, or part thereof, in the city of *Baltimore*, according to the acts of Assembly and the ordinances of the city, a tax shall be, and hereby is imposed, upon the owner or owners of property fronting or binding upon such street, lane or alley, on the part thereof to be paved, equal in amount to the whole expense of regulating, paving and collecting the same, except cross-streets; and it shall be the duty of the city commissioners, to assess and lay the said tax upon the owner or owners of property upon each side of such street, lane or alley, or the part thereof to be paved, at a rate of not less than six cents per square foot, including curbstones and gutters, of one-half of so much of such street, lane or alley, as may be in front of such property, except the part of such street, lane or alley, reserved by ordinance for footways. And the said tax shall be assessed and levied upon, and collected from, the owner or owners of said property; and the said tax shall be a lien on such property.

Dolan and Foy, vs. The Mayor and C. C. of Baltimore.—1846.

And in no case whatever, shall the city be made responsible for the paving done in compliance with the provisions of this section, and a clause to that effect shall be inserted in the contract to pave." *Revised Ordinances*, 1838, p. 120.

It has been admitted in argument, that the proprietors of a majority of the ground binding and fronting on the street, consented to its being paved, as required by the act of 1817, ch. 148.

The Court of Appeals, in the case of *The Mayor, &c., vs. Moore and Johnson*, 6 *Harr. and Johns.*, 375, and in the case of *The Mayor &c., vs. Howard*, 6 *H. & J.*, 383, have held, that it is competent for the mayor and city council of *Baltimore*, to pass an ordinance like the one previously quoted. This being so, it is clear, the grave yard sought to be held liable for the paving tax, would be so liable, unless there be something in the legislation of the State, to exempt it.

By the act of 1841, ch. 23, sec. 2, it is provided, that nothing therein contained "shall be construed, to authorise the assessment of, or levy of any tax upon, the property belonging to the *United States*, to this State, or to any county or city in this State; or to any incorporated literary, or charitable institution, county schools, houses of public worship, burying grounds," &c. If this act exempts burying grounds from the payment of a paving tax, it also exempts all the other property included in the exemption: such a construction cannot be maintained. The exemption extends only to the public tax, and not to a release of all liability for benefits conferred: such as in the opening or paving of streets. The State, nor the city, never designed by their legislation to impose on the latter, the payment of the costs of paving streets in front of literary institutions, &c., but merely to exempt them from contributing to the public revenue. The effect of such legislation was considered by the supreme court of *New York*, in the case of *The Mayor, &c., of New York, &c.*, 11 *Johns.*, 80. In that case it was sought to be maintained, that certain churches were exempt from all liability to contribute towards the payment of the expense of opening certain streets; and the exemption was claimed under a law, which provided, "That no real estate

Dolan and Foy, vs. The Mayor and C. C. of Baltimore.—1846.

belonging to any church, or place of public worship, &c., shall be taxed by any law of the State;" but the court unanimously held, that the words "taxes," meant burdens, charges, or impositions, put or set upon persons or property, for public uses; and that to pay for the opening of a street, in a ratio to the benefit or advantage derived from it, is no burden, "if as," said the court, "no talliage or tax, within the meaning of the exemption." So in the case now under consideration, the expense of paving the street is no tax, within the meaning of the exemption in the act of 1841, but a benefit for which the ground is liable. This view is in no wise in conflict with a recent decision of the city court, exempting certain churches from contributing to the expense of opening *Fayette* street. In that case, they were exempted by the express language of the act of Assembly, and the ordinance of the city providing for the opening of the street. It is no part of the duty of this court, to quarrel with the legislature of the State; or to inquire, whether the city ought to pay the expense of paving streets on which burying grounds bind? Its duty is, simply to ascertain what the State has done, and to give it due effect. If the legislation of the State and city is not in consonance with the feelings of the community, the General Assembly, and the City Council, must be appealed to, for the desired modification.

The motion to dissolve the injunction, must be sustained, and with costs.

The complainants appealed to this court.

The cause was argued before DORSEY, CHAMBERS, SPENCE, MARTIN and MAGRUDER, J.

By T. P. SCOTT and MILES, for the appellants, and

By G. M. GILL and PRESSTMAN, for the appellees.

DORSEY, J., delivered his opinion as follows :—

Having assented to the affirmance of the order of the court below, dissolving the injunction issued in this case, for different reasons than those expressed in the opinion of this court, it is due to those from whom I differ, as well as to myself, that I should briefly state my views upon this subject. The gene-

Dolan and Foy, vs. The Mayor & C. C. of Baltimore.—1846.

ral power of the corporation of *Baltimore*, to charge the ordinary tax for the paving of streets on the adjoining lots, in front whereof the pavement has been made, was conceded in the argument of both parties; as well it might be, after the principle has been so fully settled by the decisions of this court. But it is insisted, that the lot in question is exempt from such a charge, because it has been appropriated as a site for a church and grave yard, for the *Roman Catholics* of the city of *Baltimore*. And to establish such an exemption, numerous acts of Assembly, imposing taxes, or burthens, have been referred to, in which the exemption of such property has been specifically provided for. So far from such acts of Assembly shewing a general exemption from such burthens, independently of legislative enactment, they form the strongest ground for the opposite conclusion; and assume the liability of such property, but for the special statutory exemption. I think, therefore, that the injunction issued in this case, ought to have been dissolved, because the lot of ground in question, was legally chargeable with the burthen attempted to be imposed upon it.

But suppose such legal liability be not so clear; and that it is a doubtful question of law, or that the legal exemption is clearly sustainable. What is the proper tribunal for the determination of such a question? Not a court of equity; but a court of law. There is no sufficient ground for the interposition of a court of equity, by way of injunction. By permitting the appellee to proceed in doing that, against which he has been enjoined, no irreparable injury or injustice is done to the appellant. If the property were liable to the charge, it was against law, equity, and conscience, for a court of equity to interfere to prevent its enforcement. If it were not liable, then no such injury would have been, by the acts enjoined, inflicted upon the appellants, or any body else, as would have warranted the interposition of a court of equity, by way of injunction. The contemplated sale for the payment of the paving tax, would have divested the owners of the lot of no right, legal or equitable. The purchaser at the sale must have sued in ejectment, to recover possession; and in that action he must have been defeated, if the paving tax were not legally

Dolan and Foy, vs. The Mayor & C. C. of Baltimore.—1846.

charged upon the property. As an authority for this, if indeed an authority could be requisite to establish so plain a proposition, see *The Trustees of Louisville vs. Gwatheney and Grentsinger*, 1 A. K. Marshall, 554. Upon this ground, therefore, the order dissolving the injunction ought to be affirmed.

But I cannot assent to the affirmance of the order appealed from, upon the ground that the appellants have no standing in a court of equity, and for that reason, only, not entitled to the relief they seek. Such a proposition assumes, that *Robert Walsh, Jr.*, the heir at law of the surviving trustee, would be entitled to such an injunction as was issued in this case; that he had no interest in the lot of ground, but for the protection of the rights and interests of the *cestui que trusts*, the *Roman Catholics* of the city of *Baltimore*, is apparent upon the face of the conveyance. If then such a trustee refuse to exert the powers necessary for the protection of his *cestui que trusts*; or be in a situation, as here, where he has not the means of doing so; should a court of equity deny all relief to an application of the *cestui que trusts*; on the ground that they cannot be heard in their own behalf, that they have no standing in a court of chancery? Nay, is it not a fundamental distinction between courts of law and courts of equity, that in the former, *cestui que trusts* cannot be parties, their rights not being recognised at law; but in the latter, they not only may, but must be parties, in all cases where their rights or interests are to be adjudicated? The appellants are *Roman Catholics* of the city of *Baltimore*. As such they are *cestui que trusts*, intended to be benefitted by the deed from *Fell*. If they have no standing in a court of equity, when seeking the protection of their rights, nobody else can have any. In respect to himself, the rights of the trustee are purely legal; and having no personal interest in the trust fund, he would have no pretence for claiming the interposition of a court of equity, but for the protection of the interests of his *cestui que trusts*. If for them he could seek it, they can seek it for themselves.

In the case before us, no question can arise as to the forfeiture of the estate conveyed, by a breach of the condition annexed to it. The heirs of *Fell*, only, and not strangers to

Dolan and Foy, vs The Mayor & C. C. of Baltimore.—1846.

the deed, can take advantage, and claim the benefit of such a forfeiture.

CHAMBERS, J., delivered the opinion of this court.

The questions which relate to the merits of this case, involve considerations of the deepest interest to the feelings of the parties affected by the proceedings set forth in the bill.

The prospect of being called to witness the exposure to public sale of the mouldering remains of those who gave to us our being, or received theirs from us, is quite sufficient to call into exercise the warmest passions indulged by a community, of refined sensibilities. Reverence for the dead, must be the sentiment of all who can respect the living. And although the view taken by the court, will prevent them from expressing an opinion of the law, as applicable to the merits of the case, they will not consider it out of place to say, that they are fully convinced of the political and moral obligation of the constituted authorities, to protect the community over which they exercise jurisdiction, from the infliction of such injuries. They owe it to their citizens, as well upon the principle of "protection," against an act more calculated to destroy their happiness, than are many of the petty offences against which their enactments are properly directed, as also upon the principle of cultivating a sound state of social, moral, and religious character, which cannot be successfully attained by the precepts of schools and colleges, while their instructions are counteracted by the exhibition of spectacles which must shock, and ultimately weaken, the moral sense.

They owe it to the ashes of the dead. Instinct teaches the propriety of reverence for the dead, and the practice of all ages and people has conformed to its teaching.

The court however in the present case, have no other purpose in alluding to such considerations, than to invite the notice of the proper authorities to the subject, that they may exempt from sale, as well the temples set apart for the worship and service of that Almighty Being, whose we are, ourselves, and whose, is all we have, as also the ground consecrated to the undisturbed repose of the dead.

Dolan and Foy, vs. The Mayor and C. C. of Baltimore.—1846.

We propose to decide the case before us on its peculiar circumstances. The deed from *Fell*, is for the use “of the *Roman Catholics of Baltimore town*, thereon to build, constitute and erect, a church or chappel, and to lay out a burying ground for the property and advantage of the said *Roman Catholics of Baltimore town*, and for no other use,” &c. And it is declared to be the true intent of the parties, “that if the said trustees, the survivor or survivors of them, or their assigns, do not build the said church or chappel on the land aforesaid, and appropriate the residue for a burial ground for the *Roman Catholics of Baltimore town*,” then the deed is to be void, and “the reversion, and remainder, &c., to be and remain to the said *William Fell*, his heirs,” &c. It cannot be doubted, that if it was competent to the grantor to make the conveyance to the uses expressed in the deed, it was equally competent to provide for a restoration of the property to himself or his heirs, on the failure of the grantees to apply it to the purposes of the grant. If the grantees could decline the execution of the trust, in one particular, they had equal authority to neglect it in another ; if they could fail to build the church, they had the same power to decline using the “residue of the land, as a burial place.”

The bill, in fact, does allege an entire alteration in the use of the burial ground, as defined, in the deed, when it says, that since the erection of *St. Patrick's Church*—which is not on the granted premises,—“the use of said burial ground hath been confined to the congregation of that church.”

As the foundation of title, the bill alleges, that the lot was used as a burial ground during the life of *Fell*, and with his knowledge, consent, and approbation, and with the knowledge and assent of the trustees, and that after the execution of the deed, “the members of the *Catholic Church* in the eastern part of the city,” with the knowledge and consent of the surviving trustee, and with the knowledge of, and without objection from, “the heirs of *Fell*, did erect *St. Patrick's Church* on another lot,” retaining the use of the lot so conveyed by *Fell*, as a burial ground, for the congregation of said church.

Dolan and Foy, vs. The Mayor and C. C. of Baltimore.—1846.

We cannot agree with the appellant's counsel, that any or all of these facts can give to the complainant, *Dolan*, as a priest of the *Catholic Church* in said city, and pastor of *St. Patrick's Church*, "or to the other complainant, *Peter Foy*, who claims as a resident of the city, and a member of the *Catholic Church*, before and at the time of the date of said deed, and ever since," and as having "buried in the said ground, members of his family, who were members of the *Catholic Church*, at the time of death," any interest, legal or equitable, to entitle them to claim the interposition of this court.

Objection was taken to the bill, for the systematic and uniform departure from the language of the deed, in describing the persons for whose use the property was intended. In every instance they are called in the deed "*Roman Catholics*;" in every instance they are called in the bill, "*Catholics*," a designation which, if not common to every branch of the *Christian Church*, is certainly not exclusively applicable to the particular branch whose members claim under this deed.

We however waive this point, which might be the occasion of an amendment, and we waive also another, not alluded to in the argument, to wit, the sufficiency and certainty in the intended objects of the trust.

We do not think the appellants, or either of them, have any standing in a court of equity, which can entitle them to the interposition of its process. If the conditions of the deed have not been performed, the whole estate, legal and equitable, will have reverted to the heirs of the grantor, unless the heirs of the surviving trustee can allege, and prove in a court of equity, such positive agreement on the part of *Fell*, or his heirs; or such specific acts of the parties, with the distinct knowledge of the grantor, or his heirs, amounting to evidence of such an agreement, as would entitle the claimants, by a bill for specific execution of such agreement, to a deed of conveyance, discharged of the conditions so violated. There is no such agreement, there are no such facts alleged in this bill.—The trustees had no power to alter or change the na-

Stockton vs. Frey.—1846.

ture and object of the trust, or dispense with the exact performance of the condition; a court of chancery has no such power. The owner of the property had the exclusive right to prescribe the terms of his grant, and in case of non-compliance with them, the grantees must suffer the just and inevitable consequences of their failure. We do not mean to say, that title could be derived from *Fell*, or his heirs, in no other mode but by a formal deed, duly executed and recorded, to enable a court of equity to enforce rights acquired by their assent, but there is nothing set forth in the proceedings, which can be regarded as at all sufficient for that purpose. The pastor of *St. Patrick's Church*, as such, has no right to, or control over, the property, by the terms of the deed; or by any appointment of the grantor, or his heirs, or even of the trustees. Nor is the interest of the other appellant, in any view we can take of the subject, such as will entitle him to the proceeding which has been resorted to.

We are compelled therefore to affirm the decree of *Baltimore* county court, dissolving the injunction.

DECREE AFFIRMED.

LUCIUS W. STOCKTON vs. IRA FREY.—*December* 1846.

In an action to recover compensation for injuries done to the person of plaintiff, by the negligence of the driver of a stage, which was thereby upset, the plaintiff cannot give in evidence, for the purpose of increasing the damages, that he had a wife and children.

It is the duty of a stage owner, in the transportation of passengers, to have drivers of competent skill, who should use such skill with diligence, and the utmost caution and prudence; they must be well acquainted with the road they are bound to travel, furnished with well broken, safe, and steady horses; coaches and harness of sufficient strength, and properly made: the least failure in any one of those particulars, subjects the stage owner to the imputation of negligence, and makes him responsible for the injury or damage arising from such failure.

A prayer which enumerates the facts, to comply with which, constitutes the duty of the defendant, and that upon a failure in any one of the particulars enumerated, if so found by the jury, then, in point of law, the defendant did not perform his duty, but was guilty of negligence, and is responsible

Stockton vs. Frey.—1846.

for the injury sustained by the plaintiff from such failure, does not raise any question upon the pleadings; it merely asks the court to instruct the jury, that the hypothesis of the prayer is the law of the case, if supported by the evidence.

In granting or refusing any prayer asking an instruction to the jury, that if they believe certain facts, the plaintiff is, or is not, entitled to recover, this court will not assume, that the county court inspected the pleadings in the cause, and adjudged their sufficiency to sustain the prayer.

If either party designs to raise any question upon the pleadings in an action at law, their prayer under the act of 1825, ch 117, should be framed with a direct reference to the pleadings.

Where a prayer may have a tendency to mislead a jury in reference to the evidence in the cause, as where it only incorporates a part of the evidence which constituted the defence, when it should have incorporated the whole, and prays, that notwithstanding the jury should believe the part embodied in the instruction, still the plaintiff is entitled to recover, it is error to grant it.

In an action to recover damages for a personal injury done the plaintiff, by the negligent driving and upsetting of a stage coach, the jury, in estimating his damages, are to consider, what, before the injury complained of, was the health, and physical, and mental ability of the plaintiff to maintain his family, as compared with his condition in those particulars, after and up to the institution of the suit, in consequence of the injury complained of, and how far it is permanent in its results, as well as the physical and mental suffering he has sustained by such injury, and should allow such damages as, in their opinion, will fairly compensate the plaintiff for the loss and injury which they may find he has so sustained.

Where a coach belonged to the *R.* line, which line belonged to the *N. R. Stage Company*, a co-partnership, composed of the firm of *S., F. & Co.*, and of *M* and *B*, and the firm of *S., F. & Co.*, was composed of the *defendant*, and *M*, and others, and that all the drivers and coaches of the line belonged to the *N. R. Company*; that the defendant had no other connexion with the line than as one of the firm of *S. F. & Co.*, and was declared against, as the owner of the line, in an action upon the case, for the negligent driving of one of the coaches by him used and employed, and pleaded not guilty, there is no variance between the pleadings and the proof.

The members of a firm are individually liable in actions of *tort*, for the acts of the firm, their agents and servants, and for such acts may be sued individually.

To entitle the plaintiff to recover against the owner of a stage coach, for injuries sustained by him in his person, the jury must find, that the injury to the plaintiff was occasioned by the negligence of the defendant, his servants or agents.

The fact of the overturning of a coach, is *prima facie* evidence of negligence; yet, if it was an accident against which human care and foresight could

Stockton vs. Frey.—1846.

not guard, and was not the result of negligence in any degree, then the plaintiff is not entitled to recover.

The law makes proprietors of stage coaches responsible for carelessness and negligence—want of due care—in the conveyance of passengers ; but not, at all events, as in the case of common carriers.

Where a plaintiff, after an injury sustained in his person from the *tort* of the defendant, agrees with the defendant, or his agent, that in satisfaction of such injury, the defendant should pay the expenses incurred by the plaintiff by his detention, in consequence of his injury, and would furnish him with a free conveyance to his point of destination, and the defendant performs his part of the agreement, the plaintiff cannot recover further damages for the *tort*.

In actions for general and unliquidated damages, the payment and acceptance of a sum of money, as a satisfaction, is a good bar.

The party aggrieved, may determine the sufficiency or insufficiency of the satisfaction paid and accepted by him.

After a cause had been committed to the jury, and partly argued before them, on both sides, it was discovered, that several interrogatories, propounded by the plaintiff to witnesses, under a foreign commission, had not been filed with the clerk of the county court, before they were propounded, nor copies served on the defendant, nor notice thereof in any way given him ; but that they were first filed with the commissioners, at the place of executing the commission, it is too late, under the 20th rule of *Baltimore* county court, to move to strike out the evidence of such witnesses, which had been read to the jury.

Where the court is of opinion, that the plaintiff cannot recover, as where there is an admission of satisfaction of his demand, they will not, upon the reversal of the judgment, upon the appeal of the defendant, award a *procedendo*.

APPEAL from *Baltimore* county court.

This was an action upon the case, for the negligent driving and upsetting of a stage coach, by which the plaintiff was injured in his person and mind, brought by the appellee against the appellant, as owner of the coach, on the 13th August 1841.

The defendant pleaded *non cul*, on which issue was joined. The verdict was against him.

1ST EXCEPTION. At the trial of this cause, the plaintiff proved, that up to October 1839, he had been an active, enterprising man, of good constitution, health and temperate habits, and being called by business, left home, *Lowell*, in *Massachusetts*, for *Missouri*, that he proceeded as far as *Frederick*, where he took a seat in a line of stages of the defendants for

Wheeling; on the evening of the 8th October 1839, the coach in which he was, with other passengers, was furiously driven, the horses hurried on, and raced in opposition to another line of stages on the same rout; that at last, in going over a break in the road, the carriage was thrown so high, that the bolt was drawn out of the forward part of the stage, which, with the wheels and horses, escaped. The main part of the coach turned a complete somerset, was smashed to pieces, and all the passengers left in the road, more or less injured. That the plaintiff was seriously injured, wounded in the head and ear, and badly bruised; that he was detained at a tavern, near the place of his accident, for about eight days, and has since been subject to occasional violent attacks of head ache; that his mind is sometimes affected, his general health feeble, his capacity for business injured, and power of enduring labor, and his business nearly destroyed. One of the horses used in the coach had ran off before. After evidence to the above effect had been offered by a great variety of witnesses in detail, the plaintiff proposed further to prove, that he had a wife and several small children; to the admissibility of which the defendant objected. But the county court, (S. ARCHER, C. J., and PURVIANCE, A. J.,) overruled the objection, and permitted the evidence to go to the jury, when it was given. The defendant excepted.

2ND EXCEPTION. In addition to the previous evidence the defendant then proved, that the coach in which the plaintiff was travelling as a passenger, at the time he was injured, was one of the coaches of the line called *The Reliance Line*, and that said line belonged to a company called *The National Road Stage Company*; a co-partnership, which was composed as members thereof, of the firm of *Stockton Falls & Co.*, and of *Daniel W. Moore*, and *S. R. Barry*; and that said firm of *S. F. & Co.*, was composed, as members thereof, of the said defendant and *Moore N. Falls*, and *Charles W. Krebs*; and that all the agents, drivers, coaches, teams, and property, appertaining to the said line, were the agents, drivers, coaches, teams, and property, of the said co-partnership, called *The N. R. S. Co.*, and that the defendant had no other connection

Stockton vs. Frey.—1846.

with said line, or with the agents, drivers, coaches, teams, and property, appertaining thereto, than as being one of the said firm of *S. F. & Co.*

The defendant further proved by *James Cowdy*, that during the year 1839, he was the agent of the said *N. R. S. Co.*, and that he had charge of that part of the road in which the accident occurred; that the place where the accident occurred was on *Tonoloway Hill*, three and a half miles west of *Hancock*, that he, the said witness, was stationed at *H.*, and it was his duty and his practice, to examine every coach as it passed up or down, in order to discover whether any thing was out of place or out of order; and that on the night when this accident occurred, and previous thereto, and before the said coach left *H.*, he carefully examined every part of the said coach, and discovered no defect or imperfection of any kind therein; and that he distinctly remembers to have examined the locking machine, and satisfied himself that in this, as in all other respects, the said coach was in perfect order and condition. The said witness says, that the coach was an excellent one; that it had been frequently over the same road, with the same locking machine thereon. The said witness further stated, that the coach arrived at *H.* about 8 o'clock that evening, on its journey westward, and that when he so examined it at *H.*, previous to its departure westward, he examined it with a candle, and examined it with the greatest care. The defendant further proved, that the driver who drove on the night when the accident occurred, was *Jerome McMullen*; that he was an experienced, sober, skilful and careful driver, and one of the very best drivers he has ever known. The defendant further proved, that the team was a good and safe team. The witness then described the place of the accident, as, &c., and the use of the locking machine affixed to the coach; the defendant further proved that the plaintiff rode over with witness to *Mann's* tavern, and that in a conversation which occurred between plaintiff and witness, at *Mann's* tavern, in reference to this disaster, witness inquired of plaintiff whether the driver was in fault, stating that it was the order of the proprietors to witness, to discharge any driver who had been guilty of the least negligence in any respect, and

Stockton vs. Frey.—1846.

that the plaintiff then expressed the hope that the driver would not be discharged, stating, that he was not to blame; that he, the plaintiff, had himself been one time a stage proprietor, and that accidents of this kind would occur, notwithstanding every possible care, and that this was such an unavoidable accident.

The defendant then, further proved by *Jerome McMullen*, that he, the said witness, was the driver of the coach at the time it was overturned, that the coach was carefully examined before he started from *Hancock*, and no defect of any kind was visible, that it was a dark night and he had his lamps lighted. That he drove with particular care, and that in passing over the first breaker on *Tonoloway Hill*, about fifty yards from the top, the locking machine gave way. That the breakage of the locking machine rendered him unable to retard the coach, which pressed on the horses, and soon caused them to run, and they did run with great speed down the hill. That he had never encountered the accident of overturning of a coach, nor had he witnessed one, but, &c. The driver then proceeded to give a particular account of the whole accident. The same witness further testified, that after the accident, he examined the locking machine, and found that the screw that ran through the roller and which connected the rod with the roller, was broken off at the shoulder; that the screw was about three-quarters of an inch in diameter, and the fracture was a new one, and which was the fracture of a solid piece of iron, and there was nothing to indicate any original defect in the iron, and to indicate that there was any flaw in the screw. The said witness described the locking machine as follows, &c.; that the immediate cause of the accident was the sudden shock given to the coach, by the obstruction of the lower breaker in the road, and the subsequent separation of the front part of the carriage and front wheels from the body of the coach, and that but for this he believes he could and would have gone safely over the breaker, and down the hill, without accident; but that, in consequence of the breaking of the locking machine, at the first breaker of the hill, it was not in his power to retard the coach, nor to restrain it by holding back the horses; that it was necessarily pressed on the horses and made

Stockton vs. Frey.—1846.

them run. He further said that he cannot account for the breaking of the locking machine, otherwise than as an accident.

The defendant further proved by *Dr. Henry V. Bramwell*, that at the time of this accident he resided in *Hancock*, and practised there as a physician, and that he visited the plaintiff at the time he was injured, &c.; described the wound, &c. The plaintiff also proved by the same witness, that after the plaintiff had been so injured, and when he, the witness, was on a professional visit to the plaintiff, it was stated by the plaintiff, that he had a right to sue for damages for the injury that he had sustained, and that it had been suggested to him to do so; but after some conversation, he stated that he knew that such accidents would unavoidably occur, and that if the defendant's agent would pay all his expenses at *Mann's* tavern, and at *McKinley's* tavern, and the witness' bill for his professional services, and would furnish him a conveyance without further charge to *Wheeling*, whenever he should require to go on, either in the public stage, or in a private conveyance, as he might require, that he would be content and satisfied, and would not sue for damages; that the witness being friendly to the proprietors, and believing that they took all care and pains practicable to guard against accidents, undertook to assure him that all this should be done, and promised to see the agent, *Mr. Cowdy*, and state to him the plaintiff's willingness to settle the matter; and he states, that he accidentally did see *Mr. Cowdy*, and stated to him what the plaintiff had said he was willing to accept, in settlement of the matter, and that *Mr. Cowdy* thereupon, on behalf of the proprietors, assented to these terms; and the witness thereupon, on the occasion of his next visit to the plaintiff, stated to him that *Mr. Cowdy* had agreed to the terms, and would pay the expenses; and provide him a conveyance, free of further charge to *Wheeling*, at any time he desired to go, either in one of the stages of the line, or in a private conveyance, as the plaintiff might prefer; and that the plaintiff on being so informed, expressed himself fully satisfied therewith. It was admitted, that the plaintiff had originally, on taking his seat, paid for the fare to *Wheeling*. It was also admitted, that *Mr. Cowdy*,

Stockton vs. Frey.—1846.

as agent of the proprietors, paid the bill of *Dr. Bramwell*, and *Mr. McKinley's* bill, and that *Mann's* bill was charged by *Mann* to the company, and paid to him by said company, in the settlement of their account with him, at the end of that year. It was also admitted, that the plaintiff when he determined to go on, was furnished, without further charge therefor, a seat in one of the lines of said company to *Wheeling*, and that he went to *Wheeling* in said line, and that he did not require or request to be furnished with a private conveyance. The defendant also further proved by *James Cowdy*, the witness of that name, hereinbefore mentioned, that said *Dr. B.* stated to him, the said witness, as agent for said company, that the plaintiff would be satisfied and content, if his bills were paid at the taverns and to the said doctor, and he were provided with a conveyance, without further charge, to *Wheeling*, whenever he desired to go on; and that he, the witness, on behalf of said company, and as their agent, assented to these terms, and desired said *Dr. Bramwell* to assure the plaintiff, that at any time he wished to go, he should have a conveyance, and if necessary, or if desired, he would send him on in a private conveyance. And that afterwards, in pursuance of his understanding or agreement, he did pay said several bills, and did furnish said plaintiff a seat to *Wheeling*, without further charge, in one of the coaches of said company's line, and that he would, if so requested, have promptly provided a private conveyance for him to *Wheeling*; and he further stated, that all his acts in the premises were approved by the said company, and the defendant, and his payments allowed to him, as credits in his accounts, at the time he ceased to be agent. He further stated, that he so ceased to be an agent for the said company, sometime early in the year 1840.

The plaintiff then gave further proof of the unsteadiness and unfitness of the horses for a passenger coach, and insufficiency of the locking machine of the coach; and both parties gave corroborative proof of the statements of their witnesses, and of their views of the case.

The plaintiff then offered the three following prayers, all and each of which were objected to by the defendant's counsel, viz :

Stockton vs. Frey.—1846.

1st. That it was the duty of the defendant, in the transportation of the plaintiff upon the journey mentioned in the evidence, to have had a driver of competent skill, and that such driver should have used such skill with diligence, and with utmost caution and prudence, and was well acquainted with the road he was bound to travel, and was furnished with well broken, safe and steady horses, a coach and harness of sufficient strength, and properly made; and that if the jury find, that there was upon the occasion of the said journey, the least failure in any one of these particulars, that then, in point of law, the defendant did not comply with his said duty, but was guilty of negligence, and is responsible for the injury or damage sustained by the plaintiff from such failure.

2nd. That if the jury find with the plaintiff, under the plaintiff's first prayer, that then the plaintiff is entitled to recover, notwithstanding they may find from the evidence of *Dr. Bramwell* and *Cowdy*, that the plaintiff stated, at the periods mentioned by them, that he thought the upsetting of the stage was accidental, and that the driver was not to blame; and although they find, that he also stated, that he would be satisfied in the manner and upon the terms stated by said witnesses, and that the expenses of the said doctor, and the other expenses mentioned by said witnesses, were settled by the defendant, or his agents."

3rd. That if the jury find, that the plaintiff is entitled to recover under the preceding prayers of plaintiff, that then, in estimating the damages he is entitled to recover, they are to consider what, before the injury complained of, was the health, and physical and mental ability of the plaintiff, to maintain himself and family, as compared with his condition in these particulars, after and up to the institution of this suit, in consequence of the said injury, and how far said injury is permanent in its results, as well as the physical and mental suffering he sustained by such injury, and that they should allow such damages as, in their opinion, will fairly compensate said plaintiff for the loss and injury which they may find he has so sustained, as aforesaid.

Stockton vs. Frey.—1846.

The defendant offered the six following prayers :

1st. That if the jury shall find from the evidence in the cause, that the coach in which the plaintiff was travelling as a passenger at the time he was injured, belonged to a partnership, as proprietors thereof, called the *N. R. Stage Company*, and that said company was composed of the firm of *S., F. & Co.*, in its capacity as a partnership, and of *D. W. Moore* and — *Barry*; and that said firm of *S., F. & Co.*, was composed of the defendant, and *M., N. F.*, and *C. W. K.*, as members thereof, but that said defendant was not a member of said *N. R. S. Co.*, in his separate or individual capacity, nor otherwise interested therein, except only as being one of the members, as aforesaid, of said firm, of *S., F. & Co.*; and shall further find, that the said coach belonged to a line of coaches running from *Hagerstown* to *Wheeling*, and that said line, and all the agents, drivers, teams, coaches, servants and property, appertaining to or connected with said line, were the agents, drivers, teams, servants and property of said partnership, called the *N. R. S. Co.*, and were not the agents, drivers, teams, coaches or servants, or property of the defendant, in his separate or natural capacity; and that said defendant had no connection with said agents, drivers, teams, coaches, servants or property, in any respect whatsoever, except only as being one of the members, as aforesaid, of said firm of *S., F. & Co.*; and shall further find, that the plaintiff paid his fare to the agent of said *N. R. S. Co.*, and that the defendant had no personal connection with the receipt of said fare, or with the plaintiff in any manner, and did not even know that he had taken a seat as a passenger in said line, until sometime after the plaintiff had been injured, then the plaintiff is not entitled to recover upon the pleadings and proof in this cause, because there is a variance between the pleadings and proof in this, to wit, that in the pleadings, the plaintiff counts upon a contract with the defendant alone, and the proof is, of a contract with a company, of which the defendant was no otherwise a member, than as being one of a firm which, in the aggregate capacity of its members, as a co-partnership, was a member of said company.

Stockton vs. Frey.—1846.

2nd. That if the jury shall find the facts set forth in the preceding prayer, then the plaintiff is not entitled to recover upon the pleadings and proofs in this cause, because there is a variance between the pleadings and proofs in this, to wit, that in the pleadings it is alleged, that the said coach, was the coach of the defendant, and the proof shews, that it belonged to a company of which the defendant was no otherwise a member, than as being one of a firm which, in the aggregate capacity of its members, as a co-partnership, was a member of said company.

3rd. That if the jury shall find from the evidence in the cause, the facts set forth in the first prayer, then the plaintiff is not entitled to recover in this cause, even if the jury shall believe, that the injury to the plaintiff was caused by the overturning of the coach in which he was so travelling, and that such overturning was caused by the negligence, carelessness, unskilfulness or default of the driver of said coach, and not otherwise, because there is a variance between the pleadings and such finding in this, to wit: that in the pleadings, the plaintiff complains of the alleged negligence, carelessness, unskilfulness, and default of the defendant, and his servants and agents, and the finding would be of negligence, carelessness, and default of an agent of said company of which the defendant was no otherwise a member, than as being one of a firm which, in the aggregate capacity of its members, as a co-partnership, was a member of said company.

4th. That to entitle the plaintiff to recover in this case, the jury must find from the evidence in the cause, that the injury to the plaintiff was occasioned by the negligence of the defendant, his servants or agents; and that although the fact of the overturning of the coach is *prima facie* evidence of negligence, yet, if the jury shall find from all the evidence in the cause, that the overturning of the coach was an accident against which human care and foresight could not guard, and was not the result of negligence in any degree, then the plaintiff is not entitled to recover in this case.

5th. The defendant, by his counsel, prays the court to instruct the jury, that if they shall find from the evidence in the

Stockton vs. Frey.—1846.

case, that after the plaintiff had been injured by the overturning of the coach, as testified by the witnesses in the cause, it was agreed, by and between the plaintiff and the agent of the defendant, that in satisfaction of any injury to the plaintiff, occasioned by the said overturning of the coach, the said defendant should and would pay to the several landlords and the physician, the expenses by said plaintiff, incurred by his detention in consequence of such injury; and should furnish to the said plaintiff a free conveyance to *Wheeling*, whenever he should be in a condition to travel, in the regular line, or by private conveyance; if the plaintiff should require it; and shall further find, that afterwards, and in pursuance of said agreement, the said agent of the defendant did pay all said bills, and did afford to the plaintiff a passage to *Wheeling*, in a coach of the defendant, and at the time, and in accordance with the mode of transportation required by the plaintiff, then the plaintiff, upon the issues joined in this case, is not entitled to recover in this suit.

6th. That if they shall find from the evidence in the cause, that after the plaintiff had been injured by the overturning of the coach, as testified by the witnesses in the cause, it was agreed, by and between the plaintiff and the agent of the defendant, that in satisfaction of any injury to the plaintiff, occasioned by the said overturning of the coach, the said defendant should and would pay to the several landlords and the physician, the expenses by said plaintiff incurred by his detention, in consequence of such injury, and should and would furnish to the said plaintiff a free conveyance to *Wheeling*, whenever he should be in a condition to travel, in the regular line, or by a private conveyance, if the plaintiff should require it; and shall further find, that afterwards, and in pursuance of said agreement, the said agent of the defendant did pay all said bills, and did afford to the plaintiff, without charge, a passage to *Wheeling*, in a coach of the defendant, and at the time, and in accordance with the mode of transportation required by the plaintiff, then the plaintiff, upon the issues joined in this case, is not entitled to recover in this suit.

Stockton vs. Frey.—1846.

The court, (ARCHER, C. J., and PURVIANCE, A. J.,) granted all the prayers offered by the plaintiff, and instructed the jury accordingly, and rejected all of the prayers offered by the defendant. The defendant excepted to the granting of the prayers offered by the plaintiff, and to the court's instruction accordingly to the jury; and to the refusal of the court to grant the prayers so offered by the defendant.

3RD EXCEPTION. At the trial of this cause, and after the case had been committed to the jury, and partly argued before the jury by the counsel on both sides, it was discovered, that the several interrogatories propounded to *Timothy Frey* and to — *French*, on the part of the plaintiff, were not filed with the clerk of this court before the same were propounded, and that no copies thereof were served upon the defendant, or upon his counsel, and that the defendant received no notice thereof in any way; and that the same were filed for the first time at *Lowell*, at the execution of the said commission, and with the said commissioners, and returned by said commissioners to this court. The defendant hereupon, by his counsel, moved the court to strike out the answers of said *Frey* and said *French*, to the said interrogatories, and relied upon the following rule of *Baltimore* county court:—

“RULE XX.—When such issue shall be tendered, and the fifteen days allowed for amendment or demurrer have elapsed, either party may, within ten days thereafter, apply to the clerk for a commission to examine witnesses, and shall, within the same time, serve a copy of the interrogatories upon the adverse party, or his attorney, together with the names of commissioners; and if such adverse party shall not, within ten days from the time of such service, file cross-interrogatories, together with the names of commissioners, on his part, the commission shall issue *ex-parte*; and if such commission shall not be applied for in the manner and within the time above mentioned, although the clerk is hereby authorised to issue commissions on the application of either plaintiff or defendant, or their counsel, in all cases which are at issue, provided the party applying shall serve a copy of the interrogatories upon the adverse party, or his counsel, together with the names of commissioners, at least

Stockton vs. Frey.—1846.

ten days before the commission issues, yet no commission so afterwards issued shall operate as a stay of proceedings, or prevent the cause being set down for trial, and tried in the ordinary course, unless the same shall have been issued by leave of the court, for special reasons shewn to them on affidavit.”

But the court refused to strike out the answers, or any part thereof, but determined that the same was proper evidence in the cause to be considered by the jury, upon the ground, that the same, with the other evidence taken under the commission, had been read in evidence to the jury, and were in evidence when the prayers on either side were offered and argued before the court, and decided, and the counsel had, until the objection was so made, argued the cause before the jury upon all the evidence. To which refusal and decision of the court, the defendant excepted.

The defendant appealed to this court.

The cause was argued before DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By WILLIAM SCHLEY and McMAHON for the appellants, and

By MEREDITH and REVERDY JOHNSON for the appellees.

SPENCE, J., delivered the opinion of this court.

This was an action instituted in *Baltimore* county court, by *Ira Frey*, for the recovery of damages against *Lucius W. Stockton*, the owner of a line of stage coaches, for carrying passengers from *Hagerstown* to *Wheeling*. The declaration alleges, that *Mr. Frey* was a passenger in the stage coach on the fifth day of October 1839, when, by the negligence, carelessness, unskilfulness and default of the defendant, his agents, and servants, the stage coach was upset; by reason of which, the plaintiff had his skull bone fractured and broken, and was otherwise greatly cut, bruised and wounded, insomuch that the said plaintiff became very ill, and his life was endangered.

The first question presented for our review in this case, arises on the first exception.

Stockton vs. Frey.—1846.

At the trial, the plaintiff offered to prove by a witness, that he, the plaintiff, had a family, consisting of a wife and several small children. To the admissibility of which evidence, the defendant, by his counsel, objected; but the court overruled the objection, and allowed the evidence to go to the jury, and the defendant excepted. If, in an action of this character, it be legal to offer evidence of the relations of husband and wife, and father and child, by way of augmenting the damages, it would be difficult to determine, what relations in civil and social life might not be offered for the same purpose.

If the argument be, that the party injured is thereby rendered unable to discharge the obligations which he owes as husband and father, why may not the same argument apply to the relation of debtor and creditor, guardian and ward, and many others? In all of these relations, there is both a legal and moral obligation, and to sanction such a distinction in this case, would be to establish an uncertain and dangerous doctrine. Instead of meting out to the plaintiff, the measure of damage which he has sustained from the injury, it would be compensating the wife and children for that injury.

Greenleaf, in his work on evidence, at page 220, vol. 2, states it to be law, "that injuries to the person or reputation, consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury therefore, in the estimation of damages, are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was wilful, his mental agony also." The same author, in the same work, at page 210, uses this expression: "The damage to be recovered, must always be the natural and proximate consequence of the act complained of. This rule is laid down in regard to special damages, but applies to all damage." We therefore think the court erred in overruling the defendant's objection to this evidence.

In the further trial of this cause, the plaintiff offered three prayers, and the defendant six; the court gave the instructions asked by the plaintiff's three prayers, and refused all of the

Stockton vs. Frey.—1846.

defendant's; the defendant excepted, and the judgment of the court on these nine prayers, form the second exception.

The plaintiff's first prayer presented the law of the case correctly to the jury. *Vide* the cases of *Curtis and wife, against Drinkwater*, 22 *Eng. Com. Law Rep.*, 51, and 23 *Eng. Com. Law Rep.*, 331, *Sharp vs. Grey*. This prayer raises no question upon the pleadings in the cause, but asks the court to instruct the jury, that the hypothesis of the prayer, is the law of the case, if supported by the evidence. With a view to conform to the manifest intent of the act of 1825, ch. 117, this court have on more than one occasion determined, that neither appellant nor appellee can here be permitted to urge or insist upon any point or question, which shall not affirmatively appear to have been raised and decided by the court below.

In granting or refusing any prayer asking an instruction to the jury, that if they believe certain facts, the plaintiff is or is not entitled to recover, this court will not assume, that the county court inspected the pleadings in the cause, and adjudged their sufficiency to sustain the prayer.

If the party seeking the court's instruction designed to obtain the judgment of the court upon the pleadings in reference to his prayer, he should have framed it accordingly; as for example, that the plaintiff is, or is not, entitled to recover under the pleadings in the cause. Then the court below must have decided, upon the sufficiency of the pleadings to support the prayer, and their decision on the question would have formed a fit subject for review, on an appeal to this court. But where, without any direct reference to the pleadings, a prayer is made for an instruction to the jury, that if they find certain facts, the plaintiff is entitled to recover; all that the court decides since the passage of the act of 1825, in granting the prayer, is, that the facts enumerated constitute a good cause of action, wherever it is competent for the plaintiff to recover. Upon the pleadings, as no exceptions are taken to them, the court expresses no opinion, and grants the prayer, as if their sufficiency and accordance with the case made by the prayer, were admitted by the parties.

Stockton vs. Frey.—1846.

To give a contrary construction to this act of Assembly, would be to open the door to many of the evils, which it was prominently designed to shut out. By its passage, the legislative intent was, that all objections to pleadings should be raised and determined in the county courts, where, by amendments, if necessary, such objections might be obviated, and in accordance with these views, was decided in the case of *Leopard vs. The Ches. & Ohio Canal Co.*, 1 Gill, 222, where this court, in determining a question similar to that now before us, say :

“Whether the declaration states facts sufficient, if proved, to enable the appellant, the plaintiff below, to maintain his action, or whether the facts proved, sustain the allegations in the declaration, are questions which, in the case before us, under the act of 1825, ch. 117, we are not called on to decide.”

The court erred in giving the instruction asked for by the plaintiff's second prayer. Notwithstanding this prayer did not state all of the terms of the accord; yet inasmuch as there was evidence in the cause to sustain, (if believed by the jury,) all the terms of the agreement or accord, the court, by instructing the jury that the plaintiff was entitled to recover, may have misled them.

There was no error in the instruction given under the plaintiff's third prayer.

The court properly refused to give the instruction, asked by the defendant's first, second, and third prayers. There was no variance:—the members of a firm are individually liable in actions of tort, for the acts of the firm, their agents and servants, and for such acts may be sued individually. 1 *Chit. Pl.*, 74.

The defendant's fourth prayer should have been granted by the court.

We cannot sanction the conclusion of the plaintiff's counsel, that this prayer is, in principle, identical with the plaintiff's first prayer; it contains a very important qualification, not found in the plaintiff's first prayer, to wit, “That if the jury shall find from all the evidence in the cause, that the overturning of the coach was an accident, against which human care and

Stockton vs. Frey.—1846.

foresight could not guard; and was not the result of negligence, in any degree, then the plaintiff is not entitled to recover in this case.”

The law makes proprietors of stage coaches responsible for carelessness and negligence, in the conveyance of passengers, but not at all events; as in the case of common carriers. In the case of *Christee vs. Griggs*, 2 *Camp. Rep.*, 81, which seems to be a leading case on this point, *Sir James Mansfield, C. J.*, says: “There is a difference, between a contract to carry goods, and a contract to carry passengers. For the goods, the carrier was answerable at all events; but he did not warrant the safety of the passengers. His undertaking, as to them, went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered.”

This doctrine is sanctioned in the case of *Stockton vs. Saltonstall*, 13 *Peters' S. P. C. R.*, 181. So, also, in 2 *Kent's Commentaries*, 466. “The proprietors of a stage coach do not warrant the safety of passengers, in the character of common carriers; and they are not responsible for mere accidents to the persons of the passengers, but only for the want of due care.”

The court erred in refusing the defendant's fifth prayer. The agreement set out in this prayer, contained all the legal requisites of an accord, with satisfaction. It was in full satisfaction; it was certain; and it was executed.

“In an action on the case, under the plea of not guilty, the defendant may not only put the plaintiff upon proof of the whole charge contained in the declaration, but may give in evidence any justification or excuse of it, or show a former recovery, release or satisfaction.” 1 *Chitty's Pleadings*, 432. 3 *Burr*, 1353.

It was very much pressed in the argument of counsel, upon this prayer, that this agreement was defective, because it was not a full satisfaction for the damage sustained; and many cases were cited, where the agreement contained no considera-

Stockton vs. Frey.—1846.

tion, or not a full consideration, in which the courts had held such agreements void; but these are cases either of contract, ascertained damages, or tainted by fraud or unfairness: as in the case of *Thomas against McDaniel*, 14 *Johns. Rep.*, 185. It seems at this day to be settled law, that in actions for general and unliquidated damages, the payment, and acceptance of a sum of money, as a satisfaction, is a good bar. And we are entirely at fault to discover, by what rule, or in what mode, in such actions, the sufficiency or insufficiency of the consideration; is to be determined, if we reject the judgment of the party aggrieved. Shall the court assume the province of the jury, and ascertain the amount of damage inflicted on the plaintiff, to obtain a measure by which they may determine the adequacy of the consideration? Or is it to be presumed, that any tribunal is more competent to determine the point, than the party damnified? We think not.

We think the court erred in refusing the defendant's sixth prayer, for the reasons given in our opinion on the fifth.

The court, in refusing to strike out the answers of *Frey* and *French*, to the interrogatories stated in the third exception, committed no error. The motion came too late, and we concur with the county court in the reasons assigned, for rejecting the defendant's motion.

The judgment is reversed;—and as it is the opinion of this court, that the plaintiff cannot recover upon the evidence in this case, no procedendo is awarded.

JUDGMENT REVERSED.

Mayor, &c., of Baltimore vs. Lefferman.—1846.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, vs. WILLIAM LEFFERMAN.—*December 1846.*

By the act of 1821, chap. 252, for the more perfect security of the basin and harbor of *Baltimore*, the corporation of that city were empowered, whenever it might deem the same necessary, to compel individuals, companies, or bodies politic, owning property binding on *Jones Falls*, within the limits of the city, to wall up the same, on the refusal or neglect of any proprietor thereof to make such wall, after three months' notice from the commissioners of the city, which they were authorized to give: *HELD*, by the county court, and affirmed by a division of this court, that the act, in question, was unconstitutional and void.

The corporation of the city of *Baltimore*, under the act of 1821, chap 252, and its ordinances, passed to carry said act into execution, notified the plaintiff to build a wall adjoining his property on *Jones Falls*; and that upon his failure to commence the same before a given day, they would erect the same at his cost. The plaintiff built the wall at his own cost, and then brought his action of *assumpsit* against the city, to recover the amount of his expenditure. *Held*: that although the act of 1821 was void, still, the payments made by the plaintiff were *voluntary*; made with a full knowledge of all the facts and circumstances of the case; in ignorance, only, of his legal rights; without fraud, imposition, or any undue advantage taken of the plaintiff: and therefore, the amount paid could not be recovered back.

Where money is voluntarily and fairly paid, with a full knowledge of the facts and circumstances under which it is demanded, it cannot be recovered back, upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party.

A payment is not to be regarded as compulsory, unless made to emancipate the person or property, from an actual and existing duress imposed upon it, by the party to whom the money is paid.

A payment made under an apprehension, or even menace, of an impending distress warrant, would not render it compulsory.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, brought to May term 1844, by the appellee against the appellant; to recover a sum paid, laid out and expended by him, to and for the defendant, &c. The defendants pleaded *non assumpsit*, and the verdict was for the plaintiff.

At the trial of the cause, the plaintiff offered in evidence the following account, to wit:—

 Mayor, &c., of Baltimore vs. Lefferman.—1846.

For laying 176 perch, 18 ft., a 62½ per perch, .	\$110.45
“ Measuring,	2.50
“ 126¼ perch, a 75 per perch,	94.68
“ 222 perch, 19 ft., a 62½ per perch, .	139.23
“ Measuring,	3.25
“ Propping,	2.00
“ 525 perches, and 18½ ft. of stone, at \$1.50	
per perch	788.62
	<hr/>
	\$1140.73
	<hr/>

Which was admitted to be correct by the defendants, as an account of money paid for the construction of a wall on *Jones Falls*, as mentioned in said account, and paid by said plaintiff.

The plaintiff further offered in evidence the act of 1821, chap. 252, and several ordinances of the city of *Baltimore*: to be read, by consent, from the city ordinances.

The plaintiff further offered in evidence the following notices of the board of city commissioners, to wit :—

“ Extract of an ordinance, for the improvement of *Jones Falls*; approved the 1st August 1837.

“ SECTION 3RD. And be it enacted and ordained, that the city commissioners be, and they are hereby authorised and directed, by and with the approbation of the mayor, to notify the owners of property binding on *Jones Falls*, to have the same walled, agreeably to the lines established, as aforesaid; with a good and sufficient wall of stone, to the height of thirteen feet, from the *Water Company's* canal to *Gay* street; diminishing in height to ten feet, six inches, at *Baltimore* street; and to nine feet, at *Pratt* street: the said height to be measured from a point nine feet below mean-tide, at these parts of the *Falls*, to which the tide flows; and from the bed of the stream, at those parts which are above tide-water; and to have the same backed up, or filled with earth, so as to secure the banks of the *Falls* from being broken by the pressure of the water: and if any person, or body politic, shall refuse or neglect to have the same done within three months after receiving notice from the said board of commissioners, it shall

Mayor, &c., of Baltimore vs. Lefferman.—1846.

then be lawful for the said commissioners to contract, in the usual manner, with such persons as may be willing to contract to build the said wall, whenever it has not been built by the proprietors on the *Falls*, and to make out their warrants for the collection of the expenses thereof, from the owner or owners of the said property, in the usual way ; and deliver such warrants to the city collector, who shall collect the proportions of the same from the several persons chargeable therewith, in the same manner as paving taxes are now collected.”

“ CITY COMMISSIONERS’ OFFICE.

“*Baltimore, 14th May, 1838.*

“You are hereby notified, to erect a good and sufficient stone wall on the line of *Jones Falls*, in the rear of your property ; and to have the same backed up, or filled in with earth, agreeably to the provisions of the above mentioned ordinance.

“By order, R. B. VARDEN, Clerk.

“To Mr. *William Lefferman.*”

“ CITY COMMISSIONER’S OFFICE.

“*Baltimore, June 19th, 1839.*

You are hereby notified, to have erected on your property, along the line thereof, binding on the east side of *Jones Falls*, between *Centre* and *Bath* streets, a good and sufficient wall of stone, to the height of thirteen feet from the bed of the *Falls*; and have the same backed up, or filled with earth, so as to secure the banks of the *Falls* from being broken by the pressure of the water; and to have the said wall commenced, on or before the 19th July 1839, agreeably to the provisions of the several ordinances of the *Mayor and City Council of Baltimore*, relating to the improvement of *Jones Falls*, now in force; otherwise, the city commissioners will have the same done, and charged to your account, as directed by one of said ordinances.

“By order of the board of city commissioners,

“JAMES G. BARNES, Clerk.

“To *William Lefferman.*”

Whereupon the plaintiff prayed the court to instruct the jury, as follows :—

Mayor, &c., of Baltimore vs. Lefferman.—1846.

1ST. That the *first* section of the act, passed at December session, 1821, chap. 252, conferred no authority upon the defendants, to compel any persons owning property binding on *Jones Falls*, to wall up such property, so far as the said property may bind on the said *Falls*: *because said section proposes to carry out an improvement, for the general benefit of the city of Baltimore*; and is, therefore, unconstitutional.

2ND. That if they shall find from the evidence, that the plaintiff, being an owner of property binding on *Jones Falls*, expended any money in walling up said property, in consequence of the notices given in evidence, and in obedience to the ordinances under which such notices were given, and under the compulsion of such ordinances, that then the plaintiff is entitled to recover from the defendants, the amount of money so expended by him.

Whereupon the defendants pray the court to instruct the jury, as follows:—

1st. That the act of Assembly, 1821, chap. 252, conferred on the city of *Baltimore*, the power to compel the walling of property, situate as that of the plaintiff's, on *Jones Falls*; and whatever expenses were incurred by the plaintiff in erecting, or causing to be erected, the said wall, under the ordinances of the city of *Baltimore*, passed in pursuance of the authority conferred by said act on the corporation, cannot be recovered by the plaintiff in this action.

2nd. That if the jury shall believe from the evidence, that the plaintiff did contract with certain persons to build said wall on *Jones Falls*, and did pay the amount of the bill offered in evidence, by said plaintiff, as the expense thereof; nevertheless the payment was, under the circumstances, a voluntary payment, and the money cannot be recovered from the defendant, in this action. The court, (PURVIANCE, A. J.,) granted both of the prayers of the plaintiff, and refused the prayers of the defendants; the defendants excepted.

The judgment being against the city of *Baltimore*, she prosecuted this appeal.

The cause was argued before DORSEY, CHAMBERS, MAGRUDER and MARTIN, J.

Mayor, &c., of Baltimore vs. Lefferman.—1846.

By PRESSTMAN and NELSON, for the appellants; and
By DAVID STEWART, for the appellee.

MARTIN, J., delivered the opinion of this court.

It appears from the record in this case, that the legislature of *Maryland*, by the first section of an act passed on the 23rd of February 1822, provided :

“That for the more perfect security of the basin and harbor of the city of *Baltimore*, the corporation thereof shall have power, whenever it may deem the same necessary, to compel individuals, companies, or bodies politic, owning property binding on *Jones Falls*, within the limits of the city, to wall up such property, so far as the said property may bind on the falls, in such manner as the corporation may by ordinance direct.”

The mayor and city council of *Baltimore*, in pursuance of the power granted by this act, by an ordinance of the 25th of July 1837, directed the city commissioners to notify the owners of property binding on *Jones Falls*, to have the same walled, as specified in the ordinance, which provides :—

“That if any person or body corporate, who shall refuse or neglect to have the same done within three months after receiving notice from the board of commissioners, it shall then be lawful for the said commissioners to contract, in the usual manner, with such persons as may be willing to contract to build the said wall, wherever it has not been built by the proprietors on the *Falls*; and to make out their warrants for the collection of the expenses thereof from the owner or owners of the said property, in the usual way, and to deliver such warrants to the city collector, who shall collect the proportions of the same from the several persons chargeable therewith, in the same manner as paving taxes are now collected.”

On the 14th of May 1838, the appellee was notified to erect a stone wall on the line of *Jones Falls*, in the rear of his property, agreeably to the provisions of this ordinance. And on the 19th of June 1839, a notice was again served upon him, by which he was required to erect a stone wall upon his property, and to have the wall commenced on or before the

Mayor, &c., of Baltimore vs. Lefferman.—1846.

19th of November 1839, agreeably to the provisions of the several ordinances of the mayor and city council, relating to the improvement of *Jones Falls*, otherwise the city commissioners would have the same done, and charged to his account, as directed by one of the said ordinances.

It appears from the evidence in the cause, that the appellee, in compliance with these notices, erected upon his property, binding on *Jones Falls*, a stone wall, as required by the ordinance to which we have referred; and at the May term 1844, of *Baltimore* county court, instituted an action of *assumpsit* against the appellants, for the purpose of recovering from them the money thus expended.

In this condition of the case, the plaintiff below asked from the court the following instructions :

First. That the first section of the act passed at December session 1821, chap. 252, conferred no authority upon the defendants to compel any person owning property binding on *Jones Falls*, to wall up such property, so far as the said property may bind on the *Falls*, because said section proposes to carry out an improvement for the general benefit of the city, and is therefore unconstitutional. And

Secondly. That if the jury shall find from the evidence, that the plaintiff being an owner of property binding on *Jones Falls*, expended any money in walling up the said property, in consequence of the notices given in evidence, and in obedience to the ordinance under which such notices were given, and under the compulsion of such ordinance, that then the plaintiff is entitled to recover from the defendants the amount of money so expended by him.

Upon the question raised by the plaintiff's *first* prayer, that which respects the validity of the first section of the act of Assembly of 1821, chap. 252, this court is equally divided in opinion. The opinion of the county court pronouncing this statute to be unconstitutional and void, stands affirmed; and the requisition imposed upon the appellee, to construct a wall on his property binding on the *Falls*, by the ordinance to which we have adverted, must be regarded as unauthorised and illegal.

Mayor, &c., of Baltimore vs. Lefferman.—1846.

This presents for our examination, the proposition embodied in the plaintiff's *second* prayer:—That assuming that the expenditure in question, was made by the plaintiff in consequence of the notices exhibited in evidence, and in obedience to the ordinance under which such notices were given,—an ordinance passed in the exercise of a power, not lawfully delegated to the defendants;—that an expenditure made under such circumstances, is to be considered as compulsory in its character, and entitled the appellee to reclaim from the appellants, the money expended for their use and benefit.

It is now established, by an unbroken series of adjudications in the *English* and *American* courts, that where money is voluntarily and fairly paid, with a full knowledge of the facts and circumstances under which it is demanded, it cannot be recovered back in a court of law, upon the ground, that the payment was made under a misapprehension of the legal rights and obligations of the party.

In the case of *Brisbane against Dacres*, 5 *Taunt.*, 151, *Gibbs*, justice, when examining this subject, says:—

“We must take this payment to have been made under a demand of right, and I think, that where a man demands money of another, as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he can never recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise; there are many doubtful questions of law: when they arise, the party has an option, either to litigate the question, or to submit to the demand, and pay the money. I think, that by submitting to the demand, he that pays the money, gives it to the person to whom he pays it, and makes it his, and closes the transaction between them.”

The opinion and reasoning of *Gibbs*, justice, in this case, is cited, with approbation, in *Elliott against Swartout*, 10 *Pet.*, 154, as containing a correct exposition of the law on this question; and the *Supreme Court* held:—

Mayor, &c., of Baltimore vs. Lefferman.—1846.

“That in case of a voluntary payment, by mere mistake of law, no action will lie to recover back the money. The construction of law is open to both parties, and each is presumed to know it.” The same doctrine is announced in *Clarke against Dutcher*, 9 Cow., 674, and *Mowatt vs. Wright*, 1 Wend, 355, and is too firmly settled to be questioned or disputed.

As it is evident, that the expenditure was made in this case by the plaintiff, with a full knowledge of all the facts accompanying the transaction, and in obedience to a demand, fairly, although illegally made, by the defendants; the mere circumstance, that he was at the time ignorant of his legal rights, does not authorise a reclamation of the money expended; and the counsel for the plaintiff has placed his right to recover, on the ground, that from the circumstances of the case, the jury were warranted in finding, that he had expended the money, not voluntarily, but under the compulsion of the defendants, in their exercise of an unauthorised power.

It is not pretended, that the defendants are justly chargeable with having procured this expenditure, through the instrumentality of fraud or imposition.

Or that the defendants took an undue advantage of the situation of the plaintiff, for the purpose of extorting from him the performance of this work.

As in *Pigot's* case, cited by Lord Kenyon, in *Cartwright vs. Rowley*, 2 Esp., 723, where an action was brought to recover back money paid to a steward of a manor, for producing at a trial some deeds and court rolls, and for which he had charged extravagantly. And the objection being taken, that the money had been voluntarily paid, it was held, that the money being paid through necessity, and the urgency of the case, was recoverable.

But the right to maintain this action, so far as this branch of the case is concerned, turns on the question, whether, assuming the facts asserted in the prayer to be true, the circumstances under which the expenditure was made, impressed upon it the character of a compulsory payment of money, as that term is legally understood and applied.

Mayor, &c., of Baltimore vs. Lefferman.—1846.

Upon this branch of the law, numerous cases are to be found, but it is proposed to refer only to a few of these, of unquestionable authority, and which are most analogous to the one under consideration.

In *Knobbs against Hall*, 1 *Esp. Rep.*, 84, a case frequently recognised, and in 1840, by *Lord Denman*, in *Skeate vs. Beale*, 11 *Adol. & El.*, 983, an action of assumpsit was instituted for the use and occupation of certain rooms in the *City Chambers*. One article of the set-off, which the defendant proposed to give in evidence, was as follows:—

“The defendant being indebted to plaintiff, for other *chambers*, which he then occupied. The plaintiff demanded payment, at the rent of twenty-five guineas per year. The defendant insisted that he had taken them at twenty guineas per year, only, and offered to pay at that rate. The plaintiff refused to take it, and threatened to distrain if not paid at the rate of twenty-five guineas; and the defendant, in order to avoid the distress, paid at that rate; and having proved that the *chambers* were really let at twenty guineas, proposed to set off the overplus, as paid by compulsion: But *Lord Kenyon* held, that this could not be deemed a payment by compulsion, as the defendant *might have, by a replevin*, defended himself against the distress; and that after a voluntary payment, so made, he should not be allowed to dispute its legality.”

In the case of *Fullam against Down*, 6 *Esp.*, 26, *note*, *Lord Kenyon*, when considering this subject, announced:—

“That where a voluntary payment was made of an illegal demand, without an immediate and urgent necessity, or to redeem your person or your goods, it is not the subject of an action for money had and received. The law, if so held, would subject all accounts and settlements between parties, to revision.” The opinion appears to be qualified by the remark: “the party knowing the demand to be illegal.” But the character of the payment never depends, as we have seen, on the knowledge of the party, and if voluntary, it is binding, although made under the impression, that the demand was legal.

The same position is maintained, in *Shaw vs. Woodcock*, 7 *Bar. & Cres.*, 73, where it was adjudged: That a payment,

Mayor, &c., of Baltimore vs. Lefferman.—1846.

made in order to obtain possession of goods or property to which a party is entitled, and of which he cannot otherwise obtain possession at the time, is a compulsory, and not a voluntary payment, and may be recovered back.

And *Bayley*, justice, in discriminating between a voluntary and compulsory payment, says:—

“If a party has in his possession, goods or property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money, which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion, and may be recovered back.”

In *Ashmole vs. Wainwright*, 2 *Adol. and El. N. S.*, 837, the money was paid for the purpose of delivering the goods of the plaintiff from the possession of the defendants, who detained them, as common carriers. The action to recover back the money paid for their deliverance, was sustained. *Coleridge*, justice, saying:—“That he never doubted, that an action for money had and received, might be maintained on a wrongful-detainer of goods.”

Irving vs. Wilson, 4 *Term.*, 486, was a case in which the property of the plaintiff was actually seized by a revenue officer, as forfeited, when in fact it was not liable to seizure, and money received from the owner to release it. It was a clear case of extortion and duress; and the payment made to obtain the goods, could not be considered as voluntary. *Ashurst*, justice, says:—“It was not a voluntary payment; for when the defendants had stopped the goods, the plaintiff was in their power.”

In *Clinton vs. Strong, Johnson R.*, 369, the vessel of the plaintiff was seized as having violated the non-intercourse law, but was subsequently withdrawn, as the vessel was found to be innocent. But the marshal refused to re-deliver the vessel, unless the costs were paid. The costs were paid by the plaintiff, as the only means of obtaining a restoration of his property. The court considered the property in duress; and held that the payment of the costs was not voluntary, as they were exacted by the officer as a condition of the re-delivery of the vessel.

Mayor, &c., of Baltimore vs. Lefferman.—1846.

In the case of *Chase vs. Dwinal*, 7 *Greenl. Rep.*, 134, the money sought to be recovered back by the plaintiff, had been paid to liberate a raft of lumber, detained by the defendant, in order to exact an illegal toll; and it was determined, that money paid under such circumstances, was a payment under duress, and necessity, and therefore by compulsion. The court, alluding to the maxim, "*volenti, non fit injuria*," say:—

"But this rule applies where the party has a freedom in the exercise of his will; and is under no such duress or necessity, as may give his payments the character of having been made upon compulsion." And again,

"If money is voluntarily paid to close a transaction, without duress, either of the person or goods, the legal maxim, '*volenti non fit injuria*' may be allowed to operate. But it would be a perversion of the maxim, to apply it for the benefit of a party, who had added extortion, to unjustifiable force and violence."

In the case of the *Boston & Sandwich Glass Co. vs. The City of Boston*, 4 *Medcf.*, 181, the tax was levied on the personal property of the plaintiffs, by the collector, for the collection of taxes, alleged to be due from him. With this levy placed upon their property, the plaintiffs paid the taxes, under a protest, that they were illegal, and were paid under duress, and not voluntarily. The taxes were assessed without authority, and plaintiffs recovered the amount in an action of assumpsit.

In this case the tax was actually levied on the property, and if the assessment had remained unpaid, a sale would have followed. The court in stating the ground on which a payment of this description is regarded as compulsory, refer to *Preston, vs. City of Boston*, 12 *Pick.*, 7, and say:—

"It arises from the power and authority placed in the hands of a collector of taxes, to levy directly upon the property or person of every individual, whose name is borne on the tax list, in default of payment of the taxes. To use the language of the court, in the case just referred to, such warrant is in the nature of an execution running against the property and person of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability."

Mayor, &c., of Baltimore vs. Lefferman.—1846.

The court refer to the cases of *Shaw vs. Woodcock*, 7 Bar. and Cres., 73; *Astley vs. Reynolds*, 2 Strange, 916; and *Chase vs. Drival*, 7 Greenl. R., 134, and it is evident from the whole tenor of the opinion, that they considered a payment compulsory, only when it was made for the purpose of liberating the person or property, from the duress of a party who has control of it.

We consider, therefore, the doctrine as established, that a payment is not to be regarded as compulsory, unless made to emancipate the person or property, from an actual and existing duress, imposed upon it by the party, to whom the money is paid. And that a payment made under the apprehension, or even menace of an impending distress warrant, would not render it a payment by compulsion. *Knobbs vs. Hall*, 1 Esp. Rep., 84. *Colwell vs. Peden*, 3 Watts, 328.

Testing the case before us by this principle, it is manifest, that the expenditure made by the plaintiff has none of the characteristics, of a payment by compulsion: It is the clear case of an act performed by the plaintiff, in obedience to the demand of the defendants, conscientiously and honestly preferred; which the plaintiff regarded at the time as lawful and just, but in which, it appears from subsequent events, that he was mistaken. It is the plain case, of an expenditure voluntarily and freely made by the appellee, in the belief that he was performing his duty, but under a misapprehension of his legal responsibility.

It cannot be pretended, that any duress or force was applied to the property or person of the plaintiff, as a means of coercing the execution of this work, or that the money was expended to extricate his estate from the pressure of some process that could not be resisted.

The appellee was warned by the notice of the 19th of June 1839, that if the wall was not commenced within three months, the city commissioners would have it done, and charged to his account, as directed by one of the ordinances. That is, that the appellants would direct the wall to be constructed by others, and collect such expenses as might be incurred, by suit, or distress, in the manner in which paving taxes are

Smith, *et al.*, vs. Erb, *et al.*.—1846.

collected. But this is no duress or coercion; and all that can be urged in vindication of the position assumed by the appellee is, that the expenditure was made by him, under the apprehension, that if the wall was not erected, the improvement would be executed by the appellants, and the cost charged to his account, and recovered by suit, or warrant. A payment made under said circumstances, is in law, not regarded, as compulsory in its character. If a distress warrant had been laid by the collector of the appellants, on the property of the appellee, and he had made the expenditure for the purpose of liberating his property from the predicament in which it was thus placed, the aspect of the question would have been changed, and such a payment might be treated, as by compulsion. But there is no such feature in this case, and the court, erred, we think, in granting the plaintiff's second prayer.

It follows from the views thus expressed, that this court is divided in opinion, on the question raised by the defendant's first prayer: and that we think, the court below erred in rejecting their second prayer.

The judgment of the county court is therefore reversed without a *procedendo*.

JUDGMENT REVERSED.

JACOB SMITH, JOHN MATTHIAS, JOHN GEORGE SCHLEICH, JOHN M. KEYSER, ABRAHAM SITLER, JOHN NEIBERGALL, SEN., JOHN SEPPPEL, JOHN SCHMIDT, SEN., LEWIS WEIS AND FREDERICK AHSLEGER, vs. JACOB ERB, DANIEL ZERWIG, JACOB SCHWARTZ, SAMUEL SOMMERS, ADAM DAUB, FREDERICK KRAFT, MICHAEL FREY, JACOB GRES-SLE AND FREDERICK FAUTH.—*December* 1846.

The charter of a religious corporation required, that at all meetings of the elders and trustees, the minister, for the time being, should be president of the vestry; that the male members should meet on the 1st Monday of, &c., or within ten days thereafter, to elect elders and trustees, at their church, &c. Notice to be given by the president on the Sunday preceding the day of that meeting, to elect from members, by ballot, four elders for

Smith, *et al.*, vs. Erb, *et al.*—1846.

one year, and until another election should be made; and also to elect four other members, as trustees. When elders and trustees were to be appointed, those for the time being, should, at least eight days before the election, nominate double the number of those, so to be elected. The property of the corporation was vested in the elders and trustees. In 1842, a difference arising in the congregation, at January 1843, two sets of officers were elected: one set adhering to the minister and president, were elected with his nomination. The other, appointing afterwards, in 1843, another minister and president, had also kept up a succession ever since. The election in 1842 was admitted to be valid. **HELD:** that even if the election in 1843 be invalid, still, as those elections which occurred afterwards, from 1844 to 1847, were made upon the notice of the minister and president, duly given, the irregularity of 1843 could not be relied upon, to impeach their validity; nor could those elders and trustees, who were petitioners, and elected without the notice required by the charter, claim the interference of the court, by *Mandamus*.

To constitute a valid election, notice should be given by the president of the vestry, in conformity to the charter.

A *Mandamus*, is not a proper remedy to restore a rightful vestry, to the possession of church property, wrongfully withheld.

One writ of *Mandamus* cannot issue for the enforcement of separate claims. Even if parties at one time were entitled to a writ of *Mandamus*, still, if by lapse of time, or subsequent circumstances, they are not entitled to it when it is claimed to be awarded, it will not be granted.

Where an election for officers of a corporation is had, and officers *de facto* are elected, and act, they are presumed to pursue the legal preparatory measures for an election for the next year; which when had, makes the successors, officers *de jure*.

APPEAL from *Baltimore* county court.

On the 9th October 1845, the appellants, as relators, filed their petition for a *Mandamus* against the appellees, alleging: that a congregation for religious worship, was incorporated, by the name of "*The Elders, Trustees and Members, of the German Evangelical Reformed Church in the City of Baltimore,*" by act of the November session 1797, chap. 52; that by said act, persons are to be appointed elders and trustees of said congregation; four elders and four trustees to be elected at stated periods, and after nomination to be made by the elders and trustees in authority, a certain period before the election to be made; that by said act the said elders and trustees are combined, as a collective authority or vestry, of which the minister of said congregation,

Smith, *et al.*, vs. Erb, *et al.*—1846.

for the time being, is by said act constituted the president; that the said elders and trustees, and their president, are the managers and guardians of all the concerns of said corporation and congregation, in its temporal affairs and interests, as well as in reference to its good order and government; that the said corporation was governed, accordingly, by the said elders and trustees, as a vestry, as aforesaid, and their president, until January 1842, when one *Jacob Erb* was elected the minister of said congregation, and the following persons were duly elected elders and trustees respectively thereof, to wit: *Frederick Ahlsleger, &c.*, elders, and *William Raine, &c.*, trustees; all which elders and trustees, and the said minister, accepted their respective appointments, and exercised their offices, which, in the cases of the elders and trustees, were to continue for one year, *and until successors to them should be duly elected*; that said corporation own, &c.; that said elders and trustees, went on superintending the temporal interests, and guarding the good order of the said congregation, and so would have continued to fulfil the requirements of their stations; but your petitioners state, that in this peaceable and useful course of duty, certain of said elders and trustees became obnoxious to the said minister, and to others, who instigated factious disturbance in the congregation, to involve, and thwart, and overthrow, the said elders and trustees. And your petitioners state, that pursuing this hostility to said obnoxious elders and trustees—who were the said *William Raine*, and *John Schmidt, Sen.*, and *Lewis Weis, Frederick Ahlsleger* and *Geo. Kraft*—the said minister, confederating with others of like vindictive temper, preferred, or procured to be preferred, against said elders and trustees, just named, various charges, in most instances frivolous, and had the parties illegally, and without regard to the forms and privileges of fair trial and deliberate discussion, arraigned before the congregation, or a small portion of it, constituting far less than a majority of the congregation, and irregularly assembled; and so, in the midst of excitement and tumult, and upon the assumed authority of that small body, (a large proportion even of them refusing to vote on the occasion,) the said elders and said trustees, were declared to be removed

Smith, *et al.*, vs. Erb, *et al.*—1846.

and expelled from their respective offices aforesaid, and from membership of said congregation; that this attempted deprivation and disfranchisement, was accomplished by successive procedures of the character and tenor just described, *W. R.* being first charged and deposed, and after him, *J. S., Sen.*, being charged, and then said *F. A.*, and *L. W.* and *G. K.*, and finally, the said *Schmidt, Sen.*, and *Ahlsleger*, and *Weis* and *Kraft*, being, by one resolution, proscribed and dismissed as elders and members. That the said *John Schmidt, Sen.*, who was a trustee, as they have represented, was alleged to have resigned his said office, at a period before the prosecutions, above mentioned, began; which proceedings began and ended between the months of June and September, each inclusive, in the year 1842; but your petitioners believe, and on that belief charge, that if any actual and valid resignation came from said *Schmidt, Sen.*, it was urged by said minister, *Erb*, and enforced by his own influence, unduly exerted; or by other unfair agency, which he promoted or set in motion; that after that pretended resignation was submitted to the congregation, a certain *Frederick Fauth* was, without due notice of election, or a sufficient interval after his alleged nomination, chosen to the place of said *S., Sen.*, as trustee; and so your petitioners show, that even if the seat of said *S., Sen.*, was vacated, as trustee, by effectual resignation, it was not duly and validly filled; and your petitioners aver, therefore, that if said place were vacated in manner aforesaid, it continues vacant; and that said *Fauth*, who undertook, and intruded himself into the duties and authority of it, unlawfully exercised the said office. And your petitioners therefore allege, that said *Fauth* was irregularly and injuriously imposed upon the proper and constitutional elders and trustees of the congregation, and, as they verily believe, as one less offensive to the views, and more pliant to the plans of said minister, than said *Schmidt, Sen.* was, or was likely to be; that after the expulsion of said *Raine*, and of said *A., S., Sen., W., and K.*, a pretended election, for others in their place, was held, without the form of a due nomination, or of a sufficient interval between nomination and election, as enjoined by the charter of said congregation; that under the pretence of such election, the

Smith, *et al.*, vs. Erb, *et al.*—1846.

following persons were declared elected to the places of said wronged officers, and were sought to be foisted into said offices, to wit: *Michael Frey*, as a trustee, and *Adam Daub*, *Daniel Zerwig*, *Jacob Schwartz*, and *Samuel Somers*, as elders; that said *F. F.*, *M. F.*, *A. D.*, *D. Z.*, and *J. S.*, and *S. S.*, intruded into said offices of trustees and elders, respectively, after said pretended elections, and under color and pretext thereof, assumed to perform the duties, and exercise the authority of said offices in combination with said *Jacob Gressle* and *Frederick Kraft*, who connived at the usurpation; and to the denial and exclusion of said *Raine*, and *Ahlsleger*, and *Weis*, and *George Kraft*, and *Schmidt, Sen.* That at the juncture just mentioned, proceedings in equity in your honorable court, (the bill in which has been dismissed by this court,) were instituted to restrain the interference of said pretended and intruding elders and trustees, and so to bring into actual authority and control, the unduly ousted trustee and elders aforesaid. And your petitioners state, that soon after said proceedings were instituted, the church of said congregation, the stated place of their worship, was, by assent of the parties to the litigation, closed, to await the determination of the issues between the parties. And your petitioners state, that thus, and by the controversy aforesaid, the congregation separated into two divisions, one adhering to the minister *Erb*, and the intruding elders and trustees aforesaid, and said *Gressle* and *Frederick Kraft*, and the other presided over and kept in due and legal organization by said elders and trustee who had been attempted to be deposed as aforesaid. That after proper nomination made, on due notice to said *Gressle* and *Frederick Kraft*, and to said minister *Erb*, and after the lapse of the chartered period from the nomination, the congregation whose organization was thus legitimately preserved, elected in January 1843, after the expiration of the official year of the said elders and trustee legally in authority, the following persons, being members of said congregation, as elders and trustees respectively, to wit: as elders, *L. W.*, *J. S.*, *John S., Sen.*, and *G. K.*, and as trustees, *F. A.*, and *W. R.*, *J. H.*, and *John Magnus Keyser*. And your petitioners further show, that after notice,

Smith, *et al.*, vs. Erb, *et al.*—1846.

which they insist was competent, the said congregation, after a due nomination, elected a minister of the congregation incorporated as aforesaid, the *Reverend Samuel Gutelius* in January 1844. That said elders and trustees, and minister, just mentioned as elected as aforesaid, accepted their respective offices and exercised the same; that the persons composing the other and unlawful division aforesaid, of said congregation, have, by pretext and form of election, chosen persons as elders and trustees at two periods, and have sought and pretended to continue in office as minister of the said incorporated congregation, the said *Jacob Erb*, who yet claims said office as minister, and affects to use the said office, and claim all the authority and control thereof. And your petitioners state, that since the unlawful ouster aforesaid, of said elders and trustee, the persons who have intruded into said offices, and have claimed, and some of whom still claim the functions, authority and privileges thereof, are *Daniel Zerwig*, *Jacob Schwartz*, *Samuel Sommers*, *Adam Daub*, pretending to the eldership, and *Frederick Kraft*, *Michael Frey*, *Jacob Gressle*, and *Frederick Fauth*, pretending to the trusteeship of said congregation; that the lawful authorities of said corporation and congregation, are thus interfered with and intruded upon in their respective offices and trusts; and they state that thereby, and in consequence of this conflict of pretension, and the encroachment, and threatened trespass of the said pretended elders and trustees, and minister, the said incorporated congregation are excluded from the use of their church building, and the worship there designed by the charter to be conducted, and for the enjoyment of their other real and other property; and the lawful elders and trustees, and minister of the congregation, are debarred their exercise of their offices, and duties, and trusts, and the object of said incorporating enactment is jeopardized or suspended, and the trust of said elders and trustees made idle and nugatory for all the ends of said enactment. And your petitioners are, by said intrusion and usurpation, compelled to seek the aid of your honorable court, for restraining and prohibiting by your writ of *Mandamus*, the said *Jacob Erb*,

Smith, *et al.*, vs. Erb, *et al.*.—1846.

Daniel Zerwig, Jacob Schwartz, Samuel Sommers, Adam Daub, Frederick Kraft, Michael Frey, Jacob Gressle, and Frederick Fauth, from, in any form, or by any act whatsoever, continuing their said intrusion and usurpation, and from in any wise claiming or interfering with the offices aforesaid, of minister, and elders, and trustees respectively, and from in any manner interrupting in the authority and exercise of said offices, the said *Samuel Gutelius*, as minister aforesaid, and of said *Lewis Weis, Jacob Smith, John Schmidt, Sen.*, and *George Kraft*, as elders, and said *Frederick Ahlsleger, William Raine, Jacob Heinmuller*, and *John Magnus Keyser*, as trustees; or if these last named persons should not be deemed by this honorable court, duly elected and in authority, then that in manner aforesaid may be protected in office as aforesaid, and restored to the full and undisturbed exercise thereof, the said *Frederick Ahlsleger*, and *Lewis Weis*, and *George Kraft*, and *John Schmidt, Sen.*, as elders, and said *William Raine*, as trustee; and that in either case, the said *Jacob Gressle* and *Frederick Kraft* may, by said writ of *Mandamus*, be alike prohibited and restrained as aforesaid, from impeding the lawful officers aforesaid, in the exercise of their offices respectively, and from combining with said intruding and usurping persons as aforesaid, in excluding, or seeking, or attempting to exclude, said lawful officers from the possession and exercise of their respective offices; and that this court may, by any other terms and requirements, to be directed and contained in said writ of *Mandamus*, enforce and ensure the peaceable and effectual exercise of said offices by the lawful officers aforesaid, against the acts and pretensions of said intruders and usurpers. And they pray, if it should appear that the right of said officers, or of any of them, to the relief now sought in their behalf, is so doubtful as to require such order of this court, that a new election, so far as any such doubt may make it needful, may, by said writ of *Mandamus*, be directed to be held in said congregation, in manner and at a time to be specified by this court, in respect of said ministry of the congregation, and of said eldership, and trusteeship, or of any of said parts of the government of said corporation. And your

Smith, *et al.*, vs. Erb, *et al.*—1846.

petitioners, now suing for this protection and vindication of religious and corporate rights and privileges, in behalf of themselves, and all other members of said congregation alike aggrieved and affected, aver, that at the period of the election aforesaid, of said *Raine* as trustee, and of said *Ahlsleger*, and *Weis*, and *George Kraft* and *John Schmidt, Sen.*, as elders, and from a time long before your petitioners were, and have continued to be members, duly admitted and entitled of said congregation. That said *Erb* was, as aforesaid, elected in January 1842, as minister of said congregation, to serve from June 1842, until the meeting of the conference 1843, of the denomination of christians called the *United Brethren in Christ*; which meeting your petitioners believe took place in March, in the last mentioned year; and so your petitioners aver the said *Erb*, ceased in March, in the year eighteen hundred and forty-three, to be minister of the said congregation.

And your petitioners state, that it will appear to this court by reference to the constitution aforesaid, that a minister to said congregation can be elected only upon nomination of a candidate or candidates for the office, to the congregation, by the elders and trustees aforesaid. That no valid election of said *Erb*, as minister for any term succeeding his expiration of office in the month of March 1843, has ever taken place, and that by no competent body of elders and trustees, and in compliance with no requisite forms and procedure, was said *Erb* ever after the period aforesaid nominated or elected; and thus showing the utter nullity of any continuing pretensions of said *Erb* to the ministry aforesaid, here aver, in further specification of the irregularities and unwarranted assumptions of said *Erb*, that said *Erb* holds possession of, and inhabits, the parsonage of the congregation, and that he and his adherents aforesaid, among the intruding elders and trustees aforesaid, claim, and as these petitioners believe, receive the rents of the stable of the parsonage establishment, and of the schoolhouse aforesaid, belonging to the congregation. That the dismissal of said elders and said trustee, complained of herein, was especially irregular

Smith, *et al.*, vs. Erb, *et al.*—1846.

and invalid, because, the power of hearing and trying any charges against elders and trustees and of removing them from office, and of in like manner removing any from membership of the said congregation, is lodged in the vestry aforesaid of the church, and does not belong to the congregation. And in support of the allegations of this petition, connected with the government and authorities of said congregation and corporation, your petitioners pray reference, when they shall be produced by them, to the constitution and rules of said congregation, as well as to the charter already referred to; and pray that when produced they may be deemed a part of this petition: Whereupon now your petitioners do pray your writ of *Mandamus* to the ends aforesaid, and to be directed as stated, and, in addition to the requirements therefor suggested as aforesaid, enjoining and commanding the delivery to the lawful elders, and trustees, and ministers, as aforesaid, and as insisted and shown by your petitioners, of the said parsonage, and school-house and stable, and of all other property of said corporation. And your petitioners pray accordingly all due and appropriate rules of this honorable court, for and toward the writ of *Mandamus*, and that the same, in terms as this court may order, be directed to said *Jacob Erb, &c.*, all residing in the city of Baltimore.

This petition was verified by affidavit.

The county court, (PURVIANCE and LE GRAND, A. J.,) on 9th October 1845, ordered, that the said *Jacob Erb, &c.*, show cause, on or before the 25th of October, inst., why a *Mandamus* should not issue, as prayed by the above application; provided, &c.

On the 18th December 1845, the county court also ordered, that an alternative *Mandamus* issue, according to the within application; no cause having been shown to the contrary thereof, although notice was given of said application, by service of a copy and of the order of this court of the 9th October last, agreeable to the exigency of said order. Said *Mandamus* to be made returnable on the first day of the next term of this court.

Smith, *et al.*, vs. Erb, *et al.*—1846.

Accordingly, an alternative *writ of Mandamus* was issued, as directed. To this writ the defendants made a very elaborate return, upon which the petitioners framed a variety of issues.

The issues, and the opinion of this court, and verdict, sufficiently show, what facts were in controversy.

The relators objected to the return :—

1st. That the return, and the matters therein contained, are insufficient in law, to bar or preclude them from having a peremptory *writ of Mandamus*, in this behalf, for plea to the said return, they, by force of the act of Assembly, in such case made and provided, say that, &c.

The 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 12th, 13th, objections of the relators to the return of the writ, related to the hearing, trial and defence of *Raine*, as to the alleged charge of his having two wives; the judgment of the elders and trustees thereupon; the direction to notify *Raine* of the intended trial; legality of the meeting of the congregation for that object; and that he was not guilty.

14th. They deny that said *Raine* made erasures in the church books, as in that behalf is alleged in said return.

15th. They deny that said *Raine* made false entries, or any false entry in the church books, as in that behalf is alleged in said return.

The issues, from the 15th to the 25th, inclusive, were lost.

25th. They deny that said *Erb*, in said return named, endeavored to have certain of the charges, in said return stated as having been alleged against him, investigated by the board of elders and trustees, as in that behalf is in said return alleged.

26th. They deny that any meeting or meetings of said board of elders and trustees was, or were ever called by the said *Erb*, for the investigation of said alleged charges, as in said return is in that behalf alleged.

27th. They deny that any notice was given to said *Schmidt*, *Sen.*, said *Ahlsleger*, said *Weis*, and said *George Kraft*, of any of the alleged meetings of said board of elders and trustees, alleged to have been called for the purpose of investigating said alleged charges against said *Erb*, as in said return is in that behalf alleged.

Smith, *et al.*, vs. Erb, *et al.*—1846.

28th. They deny that said *Schmidt, Sen.*, said *Ahlsleger*, said *Weis*, and said *George Kraft*, neglected or refused to attend any alleged meetings of the board of elders and trustees, called by said *Erb*, for the investigation of alleged charges against said *Erb*, as in said return alleged.

29th. Protesting that the board of elders and trustees had not lawful power, or competent authority, to refer to a meeting of the said congregation the matter of said alleged charges against said *Erb*, and the alleged matter of the conduct of said *Schmidt, Sen.*, said *Ahlsleger*, said *Weis*, and said *George Kraft*, in their alleged refusal or neglect to attend the alleged board or vestry meetings, as stated in said return; and further protesting, that said *Erb, Gressle, Frederick Kraft, Frederick Fauth*, and *Michael Frey*, had not lawful power or competent authority in the premises, they deny that *Erb, Gressle, Frederick Kraft, Frederick Fauth*, and *Michael Frey*, at a meeting of the board of elders and trustees, held on the 5th day of September 1842, referred the said alleged matters to a meeting of the said congregation, to be held on Monday evening the 12th day of September, in the year 1842, and directed public notice to be given by said *Erb*, on the next succeeding Sabbath, of the said alleged meeting, and of the time, place and object for which it was called, as alleged in said return.

30th. They deny that said *Erb* gave notice, on the 11th September 1842, as in the said return is alleged, that a meeting of said congregation would be held on the 12th September 1842, and that he stated the object for which said meeting was alleged to be called.

31st. They deny that a meeting of the said congregation, assembled, and was held on the 12th September 1842, as alleged in said return.

32nd. They deny that said *Erb*, at said alleged meeting of said congregation, on said 12th September 1842, preferred the charges against said *Schmidt, Sen.*, as in said return alleged.

34th. They deny that said *Schmidt, Sen.*, on retiring from said alleged meeting, on said 15th September 1842, stated, as alleged, that he would have nothing more to do with that congregation from that date, and thereupon immediately retired from said meeting, as in said return is alleged.

Smith, *et al.*, vs. Erb, *et al.*—1846.

51st. They deny that said alleged meeting of legal voters on said 27th September 1842, fully heard and considered all the statements and proofs which the said *Ahlsleger*, *Weis* and *Geo. Kraft*, had made in relation to said alleged charges against them.

And all matters not herein specially traversed, they pray may be enquired of by a jury, according to the act of Assembly in such case made and provided; and of, and in respect of all such matters and things traversed, and each of them, they put themselves upon the country, &c.

These issues were severally found for the defendants, except the 14th, which was found for the relators.

The parties submitted the case, each claiming judgment. The court decided the 12th and 13th issues for the defendants; and that *Raine* was guilty of adultery, as alleged in the return.

On the 1st December 1846, the county court, (*LE GRAND*, A. J.,) refused the application on the grounds following:—

The conclusion to which my mind has been brought, after as full and deliberate a consideration as I could give to the facts in this case, and to the arguments of the counsel who have so ably discussed it, dispenses with the necessity of deciding any, *but one, of the many questions* which are involved in it. But supposing the parties desirous of knowing the opinion of the court, in regard to some of the other questions, it will be briefly stated; without, however, undertaking to support it by argument.

The court is of opinion:—

1st. That there is resident in this corporation, to wit, in the body at large, a power to amove or disfranchise; that this inherent, or incidental power of amotion, is not, as was argued by counsel for relators, expressly confined to the vestry, either by the charter, constitution, or by-laws of the corporation. Rule No. 14, of those adopted in the year 1814, only gives to the consistory in certain cases, the power of excluding members from the congregation; it does not confine the power of amotion to the consistory, and not doing this, it resides in the corporation at large. *Wilcock*, sec. 3, p. 629.

Smith, *et al.*, vs. Erb, *et al.*—1846.

2nd. That the congregation had, (looking to the charter, and object of the corporation,) jurisdiction of the matter charged against *Raine*, independently of his desiring the exercise of it, as has been found by the jury; the offence charged against him has a double aspect:—first, it was indictable by the laws of the land; and secondly, it was against his duty, as a member of a religious corporation. This being so, it was not necessary he should have been first convicted by a jury. 2 *Binney*, 448.

3rd. That, although the return does not show, *in express terms*, he was convicted of the charge, yet it does show there was but one matter preferred against him, to wit: “the matter of his two wives;” that he was heard in his defence, and by the congregation, after such hearing, voted out. It showed the charge, defence, and judgment, *and*, therefore, it is what is termed in the law, a violent presumption that he was convicted.

4th. That *John Schmidt, Jr.*, and *Lewis Weis*, resigned their respective offices, and their resignations were accepted.

5th. That *George Kraft* having joined the *Methodist Episcopal Church*, (although improperly removed,) has ceased to be a member of the *German Evangelical Reformed Church*, and is therefore incompetent, legally so, to hold an office of any character of this corporation.

6th. That *John Schmidt, Sen.*, and *Frederick Ahlsleger*, were improperly amoved. Not because the congregation had no jurisdiction against the charges preferred against them, but because of the uncertainty of the proceeding against *Schmidt*, and because *Ahlsleger* was tried and condemned with others, who were charged with different offences. His case ought to have been separately heard and decided. It is not apparent from the return, on what ground *Schmidt* was removed, whether because of the charges made against him, or because of his going away from the meeting, saying, he would have nothing more to do with them. If he was amoved for this declaration, he was improperly amoved, and it not being apparent on what ground he was removed, the court is of opinion his amotion was irregular and invalid.

Smith, *et al.*, vs. Erb, *et al.*—1846.

7th. That in the case of the *death, resignation*, or disqualification of an elder or trustee, it is not necessary eight days should intervene between the nomination and the election of his successor. Without now deciding, whether the language of the 5th section of the act of incorporation be merely directory or not, the 11th section of the same act, in my judgment, contemplates an entirely different case from that referred to in the fifth section. It provides, “that in the case of *death, resignation*, or disqualification, of any elder, or trustee, the body corporate shall, without delay, proceed to the election of another person in his place, whereof due notice shall be given to the members of the corporation.”

The fifth section provides for the annual elections, whilst the 11th section provides only for extraordinary elections ; and it being doubtful, to say the least of it, whether in proceeding under it, any nomination at all is required before the day of election. It provides, that “due notice” of the time of the election shall be given, but nothing in regard to nomination is said. The “body corporate,” (that is the elders, trustees and members of the church,) shall, “without delay,” proceed to the election. Looking to the language of the section, and the object it contemplates, I am of opinion, the legislature designed to confer on the body at large, both the right of nomination and of election, in the cases referred to in it.

By agreement of counsel for the respective parties, the 12th and 13th issues have been submitted to the court for its decision. It is clear beyond all doubt, from the testimony of the witnesses examined under the commission, that *Raine* admitted he had a wife living in *Germany*, and had one here also, by both of whom he had children; and also that before the time he was married to the one in this country, he had lived with her as his wife. This being so, and there being no evidence to show he had been divorced from his first wife, the only question is, whether such admission is sufficient to establish the fact of adultery, and the fact of bigamy? An examination of the authorities has fully satisfied me, that such admissions are sufficient, and I accordingly find for respondents on both issues. 2 *Greenl. on Ev.*, 377, where it is said, on the

 Smith, *et al.*, vs. Erb, *et al.*.—1846.

trial of an indictment for polygamy or adultery, the declaration of the prisoner, that he was married to the alleged wife, is admissible, as sufficient evidence of the marriage, especially, if the marriage was in another country. There are some authorities opposed to this doctrine, to wit, 7. *John* 314 and 6 *Conn.*, 446, but the great majority of them sustain the doctrine as laid down in the text of *Greenleaf*. See *Regina vs. Upton*, 1 C. & Kir. 165. *Regina vs. Simmonsto*, 1 C. & Kir., 164. 7 *Greenl.*, 57. *Truman's Case*, 1 *East.*, P. C., 470. 2 *Wilson*, 339. 4 *Burrows*, 2057.

With these opinions, in any possible event, a peremptory *Mandamus* could only go to restore *Schmidt*, *Sen.*, and *Ahlsleger*. An examination, however, of the authorities, and a conference with my brother judges, has satisfied them as well as myself, that no writ can go in this case.

First, because the peremptory writ must follow the alternative writ, and the latter cannot be amended; and secondly, because more than one person cannot have one writ of *Mandamus*. On the first point there are numerous cases, but the one of the *King vs. the Mayor of Stafford*, 4 D. & East., 689, places the matter beyond all question. See, also, 1 *Hill*, N. Y. Rep., 55, 14 *L. Library*, 213, 214. In regard to the other question, the authorities are equally numerous and explicit. *Holt, C. J.*, in the case of *Andover*, 2 *Salk.*, 433, said: "Five persons cannot have one writ of *Mandamus* to be restored, for though the end of the writ is to do justice, yet the foundation is the wrong in turning them out, and the turning out of one, is not the turning out of another; nor can several persons join in one action on the case for a false return." The same doctrine is distinctly and unqualifiedly recognized as indisputable law in 2 *Salkeld*, 436. 1 *Wm. Blac. Rep.*, 60. 5 *Mod.*, 11. 12 *Petersdorf*, 507. *Selwynn*, N. P., 1090, (last edition,) 12 *Mod.*, 332. 15 *Viner Abr. Mandamus*, 210, (Q.) 8 *Modern*, 209. There is nothing in our act of 1828, chapter 78, which changes this doctrine, and, however absurd it may be considered, it is still the law of *Maryland*, until the legislature alters it. There is nothing in the case of the *Baptist church*, decided by this court, in conflict with this doctrine. The ques-

Smith, *et al.*, vs. Erb, *et al.*—1846.

tion was not there raised, nor was there any peremptory *Mandamus* issued. As regards the order of this court to the clerk, to issue the alternative writ, nothing can be deduced from it. The order was in compliance with the prayer of the relators, who have the right to have the alternative writ issued, as they may desire it, they taking the risk of its being correct, which question is to be determined on the final hearing of the case. Entertaining these views, the motion of relators must be overruled, and judgment entered up in favor of respondents on the verdict of the jury, and that they go without day, &c.

From this judgment the relators appealed to this court.

The cause was argued before DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By SCHLEY, MAYER and R. JOHNSON for the appellants, who insisted:—

1st. None of the officers removed were removed by the proper authority, the congregation not having the power in this corporation either to amove or to disfranchise; that by the just construction of the charter, and of the constitution, and likewise, independently of these, by the common law applicable to corporations thus organised, the vestry, (the minister, elders and trustees,) had exclusively the right to try and amove, or disfranchise, in the several cases now presented, and that consent of any of the parties charged could not confer jurisdiction.

2nd. As regards *Raine*, he does not duly appear to have been found guilty of any of the charges brought against him; and the necessary inference from the recitals of the return only, is, that the congregation decided only whether he should be expelled from office and membership.

3rd. As regards *Smith, Sen.*, it is uncertain on what charge he was tried, and of what found guilty; and nothing pretended to have been charged against him, was a sufficient ground for his amotion or disfranchisement; nor did his declarations on leaving the meeting constitute a resignation, that could have been acted on as such. It was, however, not so recognised nor acted on.

Smith, *et al.*, vs. Erb, *et al.*—1846.

4th. As to *Ahlsleger*, *Weis* and *George Kraft*, there were no sufficient charges to warrant amotion or disfranchisement; nor could the pretended trial of all together, avail in law as to either, their offences being of a several nature, if they are guilty of any.

5th. There was no effectual resignation of *Weis*. His proffered resignation was not accepted actually, nor by any necessary implication, and therefore did not operate. He was consequently out of office, if at all, by amotion and by judgment of the congregation.

6th. Notice to the accused in these corporation trials is necessary, and it must be personal, and no such notice appears, as to, at least, *Weis*, *Ahlsleger* and *Kraft*.

7th. If the members of the congregation were rightfully the judges on these impeachments, a special notice to all of them, of the meeting for the defined objects of the trials, was necessary; and that notice ought to have been personal to each, or by a mode equivalent to personal notice.

8th. The court must see that there has been a rightful and regular amotion or disfranchisement, and hence the order, if not the minute detail, of the proceeding, must be set out in the return, or cause shown, to the alternative *Mandamus*; no such fulness exists in the return. It does not, even in general terms, inform the court, that proof of the charges was given, and for aught that appears, (and as in case of *Weis*, *Ahlsleger*, *Craft* and *Smith, Sen.*, is to be inferred,) the silence of the parties was made proof of guilt, contrary to the law which in such cases does not so interpret silence of the accused.

9th. There was no due notice of the election, in the cases of the supposed vacancies of *Raine*, and *Smith, Jr's*, offices, that is, no sufficient interval between the nomination and election.

10th. The present corporation is one of integral parts, and at least, there must be a representation of each division of the officers of the corporation always extant, or the corporation will be in suspense; and for any effectual nomination, a majority must be in existence, and must meet of each class of the officers. This applies to the condition of the government of the corporation when all the elders were expelled, (*Smith Sen.*,

Smith, *et al.*, vs. Erb, *et al.*—1846.

G. Kraft, Weis and Ahlsleger,) and to the nominations following the resignation of *Smith, Sen.*, and the amotion of *Raine* and that of the four elders.

11th. The proceedings of the *Erb* division of the congregation, after the schism and the closing of the church, called elections of minister, and elders and trustees, are of no effect; if the complaint of the relators is well founded for them, the authority they claim must be recognised and restored; and one division cannot, any more than the antagonist to it, assert itself to be the church or congregation, *de facto*, or ostensibly legitimate.

12th. The alternative *Mandamus* is to be regarded as the act of the court, on the *prima facie* case made by the petition, and especially so where, as here, the relators submit themselves to the judgment of the court, for a choice, in their behalf in forms of relief. The court may then mould the peremptory writ, according to the facts of the case, as unfolded by the return and testimony. But at all events, they may so modify the latter writ, the case of such terms as are used in the present application, which, for the alternative remedies suggested in the application, refer necessarily to the results as they may appear in the sequel of the case. It is only necessary that the modification to be given to the peremptory *Mandamus*, in contradistinction to the alternative writ, be consistent with the allegations of the application, and within the issues naturally arising from them.

13th. This is not a proceeding for offices of personal profit, to be regained, but on its face pursuit, in behalf of the *corporation or congregation*, of its rights connected with its temporal concerns; and to be represented only by its lawful officers. Hence the members of the congregation, joined here with the ousted officers, or rather the officers intruded upon, in claiming relief by a restoration of the proper government of the corporation. Each officer need not, therefore, have a separate proceeding for himself. The character of this particular proceeding, forbids such distinct action.

14th. The object of the *Mandamus* here, is but to restrain interference, or arrest intrusion; and it is not strictly a case of

Smith, *et al.*, vs. Erb, *et al.*—1846.

restoration sought against a body *de facto*, the corporation *legitimately in being*, and having *an authority, to an effective extent, legitimate* Hence, the prayer of the application is proper, and within the view of the act of Assembly; and hence no enquiry is allowed into any circumstances charged, as derogatory to the complainants, and subsequent to their amotion, or not entering into this cause of attempted amotion. On other grounds, besides, any such enquiry is foreign to this case.

15th. The verdict of the jury, upon the issue joined upon the fourteenth traverse of the relators, to the return of the respondents, was in favor of the relators, with nominal damages. And the appellants will contend, that upon the true construction and effect of the act of 1828, chap. 78, the relators were entitled to a judgment, on said verdict for the damages so found, and their costs; and that on the basis of such verdict and judgment, a peremptory *writ of Mandamus* ought to have been granted, without delay, in the same manner as if said return had been adjudged insufficient.

16th. Even if the conjunction of the several persons who applied for the *Mandamus* in this case, be informal and irregular, yet, as the parties to whom it was proposed to be directed, had due notice of the application, by service of a copy of the petition, and the order of the court thereon passed, and did not shew cause against the issuing of said writ, as prayed by the said application, they must be considered as having waived this, and all other irregularities, if any, of a similar character.

17th. And further, in addition to the last mentioned point, the appellants will insist, that no matter of form not relied upon in the return to the alternative *Mandamus*, as cause against the issuing of a peremptory *Mandamus*, can avail the respondents as good cause against the issuing of a peremptory *Mandamus*; especially after the trial of the issue joined upon the traverses to said return.

18th. The appellants will further insist, that under the provisions of said act of 1828, chap. 78, and by the practice and common law of *Maryland*, a return to an alternative *Mandamus*, in order to avail as good cause against the issuing of a peremptory *Mandamus*, must be a true and complete, and per-

Smith, *et al.*, vs. Erb, *et al.*—1846.

fect justification to all that it assumes to answer, and to which obedience is not yielded. In case of insufficiency of the return, as to any part of the mandate of the writ, where the return assumes to answer the writ *in toto*, a peremptory *Mandamus* will issue in the terms of the alternative *Mandamus*, notwithstanding the partial cause shown; and if not to this extent, at least to such extent as the return is insufficient to justify a refusal to comply with the exigency of said writ.

By McMAHON, MEREDITH, and RICHARDSON, Atty. Gen. of Md., for the appellees, who controverted the appellant's points.

MAGRUDER, J., delivered the opinion of this court.

The appellants, in this case, are a number of individuals who claim to be members of "*The German Evangelical Reformed Church*, in the city of *Baltimore*:" incorporated by the act of 1797, chap. 52. They charge, that the persons now in the offices of trustees and elders, were intruded into them; and they ask that others, who are supposed by the appellants to be the trustees and elders, be restored to the temporalities of the church; and for this purpose, that a *Mandamus* be issued. The petition was filed 9th October 1845.

By the act of incorporation, those who then were, and who afterwards might become, members of the congregation, are made one body politic, with the usual privileges conferred by our legislature upon religious corporations. The charter requires, that the male members, of the full age of twenty-one years, shall meet on the first Monday of January, then next, or within ten days thereafter; and on the first Monday of January, or within ten days thereafter; in every subsequent year, at their church: or such other place within the city of *Baltimore*, as may be appointed by the elders and trustees *for the time being*. Notice is to be given by the president on the Sunday preceding the day of such meeting, to elect by ballot four of the members, to serve as elders for one year, and until another election is made, in virtue of this act; and also to elect four other members as trustees, to serve as aforesaid. In another section of this act it is provided, that when elders and trustees are to be

Smith, *et al.*, vs. Erb, *et al.*—1846.

appointed, the elders and trustees for the time being, shall, at least eight days before the day of election, nominate double the number of the elders, or trustees, so to be elected. The president for the time being, with the elders and trustees, are to meet to regulate the concerns of the body; to make by-laws, deemed necessary for the good conduct of the members, and management of their temporal concerns: such laws not being contrary to the constitution and laws of the State.

The charter provides, that at all meetings of the elders and trustees, the minister for the time being, shall be the president; and in the event of his death, absence or removal, the elders and trustees shall appoint one of their own body, who, during the absence, removal, or death of the minister, shall have all the authority and privileges of the president. The title to property then held for the use of the congregation, is vested in the trustees and elders; and the last two clauses provide, that in case of the death, resignation, or disqualification of any elder or trustee, the body corporate “shall, without delay, proceed to the election of another person in his place; whereof due notice shall be given by the president to the members of the corporation; and that, at a reasonable time before each and every election, the president shall nominate and appoint three persons to be judges thereof.

The appellants are styled by their adversaries, the discontented portion of the congregation; and in speaking of themselves, they give us to understand that a controversy arose in the congregation, and in consequence they separated into two divisions, one adhering to the minister, *Erb*, and the intruding elders and trustees, aforesaid, and two of the officers, whose title is not questioned; and the other, to which the appellants belonged, was kept in due and legal organization, by those elders and trustees who had been deposed.

The appellants complain of divers irregularities in the proceedings of those, who acted with the minister, in the trial and expulsion of members of the congregation, and also of officers. If those persons were here, complaining, in a proper form, of the treatment received by them, it would be difficult indeed to justify or excuse all the acts done by them, “for the good con-

Smith, *et al.*, vs. Erb, *et al.*—1846.

duct and government of the members.” But the question before us is not, with what abuses of power and acts of injustice either of these divisions can be charged? but, who, at the time of this application, and at this time, can claim in virtue of the charter, the powers which it is said have been abused?

On the part of the appellants it is insisted, that the persons for whom they have been accustomed to vote, since the division spoken of in the petition took place, were, and are rightfully the persons, to exercise all the powers conferred upon the pastor, elders and trustees of the congregation, and that those in office during this time, the officers *de facto*, were intruders.

The difficulties to be encountered, seem to have suggested themselves to the petitioners themselves; since they are unable to tell us in what precise form relief can be extended to them. Obviously it is not sufficient to prove, that the election which took place in January 1843, was not holden in strict conformity to the charter, because it is to be presumed, as the charter directs it, that since the alleged irregularity, and in the years 1844, 1845, 1846 and 1847, elections of those officers, who are to be annually appointed, have taken place; and touching the validity of any of these subsequent elections, we are not now to enquire.

Surely those who were elected in January 1847, (if that election was in conformity to the charter,) are not to be dealt with by us as intruders, because it may appear, that the election in 1843 was not valid; and must have been so adjudged if its validity had been questioned, at a proper time, and in a proper way.

The question, perhaps, is one of life or death to this congregation, so far as its existence or prosperity depends upon the existence of the corporation. On both sides it is insisted, that each has attempted to keep up the succession; and each insists, that the other has been unsuccessful in its attempts; and if it be true, that for the alleged irregularities, the election by the petitioners, and their division, was void, it would be difficult to prove the existence of a legal body which can sue or be sued; or in any way assert title to the property belonging to this corporation.

Smith, *et al.*, vs. Erb, *et al.*.—1846.

It is true, the appellants contend, not only that every thing which has been done by their adversaries is illegal, but that they have taken care to do, as it ought to be done, every thing which must be done, in order to a valid election. But this, a reference to the charter will show to be utterly untrue.

It is assumed by both parties, that the election in January 1842, was a valid election. And it is also admitted, that the vestry then chosen, in the course of the term for which they were chosen, elected the defendant *Erb*, as pastor of this congregation, and to continue such until March 1843. During this term, then, the congregation was supplied with a pastor, who was undoubtedly its pastor, and would have been such, although there had been, from the time of his election, not one trustee, or elder in office, under the charter granted by the legislature.

A new election, according to the provisions of the charter, of the trustees and elders, was to be made in January 1843, and it seems to be conceded, that two elections, *de facto*, took place. The appellants say, that the election made by them, and those who acted with them, was valid. This, however, is impossible, because in order to an election in strict conformity to the charter, notice of that election must be given the Sunday previous, by the president of the vestry, who was then the *Rev. Mr. Erb*, himself, from whom the appellants had separated. By another clause, the same gentleman was the only person authorised to appoint the judges of the election; and the nomination of double the number of the trustees and elders, to be appointed in January 1843, was to be made by the president, elders and trustees, for the time being." This *organization* then, can claim nothing under this charter, in virtue of their organization. It seems to be taken for granted by the appellants, that their pastor, trustees and elders, are not in possession of the property of the corporation, or why this application? And if they are the vestry, *de jure*, a *Mandamus*, surely, is not the proper remedy. The object of a writ of *Mandamus*, we are told, "is not to supersede legal remedies, but only to supply the defect of them, by commanding the person to whom it is directed, to do something, which it is supposed

Smith, *et al.*, vs. Erb, *et al.*—1846.

he is bound by his duty to do; which the party prosecuting the writ has a right to have done; and for which the applicant has no other specific legal remedy, or such other remedy has become obsolete." *Step. Nisi Prius*, 2291. Now, if the allegation be true, if by these petitioners, and others of the congregations, there was at the time of the application "lawful elders, trustees and ministers, as aforesaid,—of the said parsonage and school house, and stable; and of all other property of said corporation:"—surely the law gives them other and complete remedies against those who hold any of the property; and they need not the aid of a writ of *Mandamus*.

If any of their privileges as members of the corporation have been invaded, then, to be sure, the law ought to afford them an ample remedy; but the law, (see *Step.*, 2323,) says, that "one writ of *Mandamus* cannot issue, for the enforcement of separate claims."

The difficulty of discovering in what way relief is to be afforded to these petitioners, seems to suggest itself to them. They claim the rights of members of this congregation, and it no where appears that any of their rights, as members, have ever been questioned. If they be members, they may have been allowed to vote at the recent election of elders and trustees; and may have elected the very men, whom it is their desire to have for elders and trustees; or if they have not, the court cannot say that it is not owing to the circumstance, that although the election was in every respect regular, they were found to be in the minority. We cannot infer from the account, which they themselves give, and which is uncontroverted, they have not separated from the congregation, (which they had the power to do,) or that they would again be members, unless, in some way or other, they can be allowed to carry back with them, their own pastor, elders and trustees.

It is argued, that the acts of the vestry were not valid; and in order to be valid, they must be the acts of trustees and elders, *de jure*. But in *Vernon Society against Hill*, 6 Cow., 23, it is said, that the trustees of a religious society, though they are irregularly elected, are in *colore officii*; and 1st *Hall N. Y. Rep.*, 191, we are told, that where the trustees of a religious society

Smith, *et al.*, vs. Erb, *et al.*—1846.

sue, *colore officii*, the defendant cannot object to their right of recovery, upon the ground that they were not trustees, without showing, that proceedings have been instituted against them by government, and carried on to judgment. If it be alleged, that the present proceeding is the proceeding here alluded to; the obvious answer is, that it is too late now to question the legality of an election made several years ago, when the term for which the election was made, has long since expired. It cannot be pretended in this case, that the defendants are to be considered as trustees, *virtute electionis*, in 1843, when each party insists, that a valid election was made in 1844; and neither denies, that such an election took place in 1845, 1846, and 1847.

The good sense of the decisions before alluded to, must be obvious. A member elect of the legislature, is permitted to retain his seat, although it is disputed; and is permitted to vote, so long as he retains his seat; and by his single vote, measures of great importance may be carried or defeated. It may afterwards be decided, that although a member *de facto*, he was not *de jure*: that another candidate was duly elected, and was in truth the member *de jure*. Yet all the acts and votes of the former, until he was legally ousted, are as valid as they would be if his seat could not be contested.

The law ought to be strictly obeyed; but it is possible that its directions may not be strictly, and in all respects, complied with; and yet a fair election may be had, and all persons who have a right to object, may be satisfied with the result.

It may be thought that there are reasons of state, which justify these decisions, in regard to the election of delegates and senators, and governors, but do not furnish precedents for our guidance, in deciding cases like the one before us. To this it may be answered, that if they be right in the cases alluded to, then it must be absurd, and moreover, it would be wicked, to depart from such rules, in such cases as the present. Is it to be deemed of no importance in this christian land, that houses of public worship are to be shut up, because of objections like these? or, that the real christian portion of a congregation are prevented by injunction and *Mandamus*, from assembling

Smith, *et al.*, vs. Erb, *et al.*—1846.

with their christian brethren, at their accustomed place of public devotion?

Corporate rights, and the little offices which the incorporating act create, may be deemed of value by some, who rather than be defeated in their wishes in regard to them, will disturb the peace of a congregation; but there are other privileges to which others are entitled, and of which they ought not to be deprived by groundless objections. The law selects the persons whose duty it is to give the notices, and make the nominations, which it directs. It ought not to punish others for their omissions of duty, when it is not in proof, that, by reason of these omissions, any object of the law in requiring them, is frustrated. If the individuals heretofore holding offices in this corporation, were not, *de jure*, they were, *de facto*, trustees and elders, and their official acts in 1843, must not be questioned at this late period.

But even if there was in the election in 1843 some irregularity, still, we are bound in deciding this case, to conclude that the elections took place, and that the persons elected were, *de facto*, trustees and elders for that year; gave the legal notice, and made the nominations required the ensuing year; and that the same was done subsequently: and if so, then ever since there have been trustees and elders *de jure*. If the law has been obeyed since the year 1843, and this we are not to question, an election of elders and trustees has been recently made:—and surely, the court can have no right to take from the persons in whom the law vests it, the property of this corporation; and give to others, who, perhaps, were the legal owners of it in the year 1842, even although they were wrongfully deprived of it then, but by a title which was determined the 1st of January 1843.

These views of the subject render it unnecessary to enquire, whether in the trial and condemnation of individual members and officers, in 1842, the pastor and his vestry acted according to law? Nor is it necessary to express an opinion upon many of the points decided by the court below. The judgment is affirmed, because, even if the parties were once entitled to it, it is too late now to order a peremptory *Mandamus*.

JUDGMENT AFFIRMED.

Brawner and wife, *vs.* Franklin, *et al.*—1846.

WILLIAM H. BRAWNER, AND MARY C. BRAWNER, HIS WIFE,
vs. ELKANAH F. FRANKLIN, JOSEPH H. FRANKLIN AND
SARAH F. FRANKLIN.—*December* 1846.

F purchased of *M* and *S*, their interest in a tract of land; and took from *S*, then an infant, a bond of conveyance, with security, for the land, conditioned to convey, at a time after she came of age. All the purchase money was paid, and *F*, who had gone into, remained in possession; when *S* came of age, she refused to ratify the sale, execute a deed, or repay the purchase money, but brought ejectment in the name of herself and husband, to recover possession of her undivided interest. **HELD**: that she was not liable to be restrained by injunction.

The answer of one of the co-defendants, the security in the bond of conveyance, disclosed the fact, that the purchase money for the land had been paid to the husband of *S*, by the complainant, after his marriage. **HELD**: if such were the case, he could be restrained, from recovering the land sold, at law, during his life time; and that the cause ought to be remanded, to give the complainant an opportunity of amending his bill, and claiming an injunction against the husband and wife, during the life of the husband.

It is a general principle, as well at law as in equity, that no person under the age of twenty-one years, is competent to make a binding contract, unless it be for necessities.

No executory contract by him *bona fide* entered into, during minority, unless confirmed after arriving at years of maturity, can be decreed to be specifically performed by a court of equity; or enforced in a court of law.

Nor in the absence of such confirmation, when pursuing his legal rights in contravention of such contract, can the infant be restrained from so doing, by a court of equity interposing a prohibition by way of injunction.

Such an interference, to restrain the violation of a contract, is only warranted where the contract is susceptible of enforcement in a court of law, or in a court of equity.

An adult cannot enforce an executory contract with an infant, upon which the former has advanced the consideration, nor recover it in an action of assumpsit, where the specific and identical consideration has been parted with, by the infant.

If the infant have already advanced money upon a contract, which is executory upon the part of the adult, he cannot disaffirm it, and sue the other party for the advance, whenever it was paid on a valuable consideration, which has been partially enjoyed, and especially, if he had received the benefit of his contract.

Where a bill for an injunction states no proper case, and it is not aided by the answers, under the act of 1835, chap. 380, the court may either dissolve the injunction and remand the cause, or dismiss the bill; but if it appears to the court, that although the injunction was properly dissolved, yet the complainant may have relief by amendment, it will, after dissolving the injunction, remand the cause for amendment and further proceedings.

Brawner and wife, vs. Franklin, et al.—1846.

APPEAL from the Equity side of *Charles* county court.

On the 31st October 1844, the appellees filed their bill, alleging, that *Elkanah Franklin*, the father of *E. F.* and *J. H.*, and the husband of *Sarah*, died in the year 1840, leaving the appellees, his widow and children, alive, and also *Mary E. Franklin*, his daughter. The said *E. F.*, by his last will, devised all his real estate, called by the name of "*Three Sisters*," to his three sons, to wit, *E. F.*, *J. H.* and *F. E. F.* Before the death of the said *E. F.*, the said *F. E. F.* died, and his legal representatives are two of the complainants in this bill, to wit, *E. F.*, and *J. H.*, and his sister, *M. E. F.*; that the said *E. F.*, during his life time, that is to say, in the year 1839, purchased a part of the tract of land called the "*Three Sisters*," from *M. F. Speake* and *Mary C. Speake*, who held the said parcel of land as tenants in common. That the said *Margaret F. Speake*, executed to the said *E. F.*, an absolute deed for all her undivided interest in the said premises; but that the said *M. C. S.*, being under the age of twenty-one years, executed her bond jointly with, &c., *Bennett Dyson* as her surety, conditioned, that the said *M. C. S.* should, on or before the 20th January 1842, execute a deed conveying title to the undivided interest of the said *M. C. S.*, in a part of a tract of land called the "*Three Sisters*," lying, &c. At which said time mentioned in said bond, the said *M. C. S.* would have passed the period of her minority. That the whole of the purchase money for the said undivided interest of the said *M. C. S.*, in the said land, had been paid, on the 19th day of September, in the year 1839, that before the time when said deed was to have been given, to wit, the 20th of January 1842, the said *M. C. S.* intermarried with a certain *William H. Brawner*, and that the said *W. H. B.*, and the said *Mary C.*, now altogether refuse either to give and execute a good and valid deed to the heirs of the said *E. F.*, in conformity to the conditions of the said bond of the said *M. C. S.*, or to pay back to the said heirs the said purchase money, which has been heretofore paid for the undivided interest of the said *Mary C.*, in the said parcel of ground; that the said *W. H. B.* and *Mary C.*, his wife, have instituted an

Brawner and wife, vs. Franklin, et al.—1846.

action of ejectment in *Charles* county court, against your complainants, for the recovery of the undivided interest of the said *Mary C.*, in the said part of a tract of land called the "*Three Sisters*," and for the conveyance of which her bond was given. Prayer for decree, that a deed should be given to the heirs of the said *E. F.*, in conformity to the bond of the said *M. C. S.*, or that the obligors in the said bond, shall pay back to the heirs of the said *E. F.*, the money heretofore paid for the purchase of said land, with interest; for such other and further relief as their case may require; for writ of injunction, to the said *W. H. B.* and *M. C.*, his wife, to stay all proceedings, whatsoever, in the aforesaid action of ejectment, &c.; subpœna, &c., against *William H. Brawner, Mary C.*, his wife, and *Bennett Dyson*.

With this bill were filed the various instruments referred to in it.

"The condition of the obligation of *Mary C. Speake* and *Bennett Dyson*, was such, that if the above bound *Mary C. Speake*, shall and do, on or before the 20th January 1842, make, execute and acknowledge, such act, deed, or conveyance, which shall be needful for conveying, assuring, transferring, establishing and confirming, unto the said *Elkanah Franklin*, his heirs and assigns, a good, pure, absolute estate, in fee simple, clear of all incumbrances, of, in and to her undivided interest in and to a part of a tract or parcel of land, situate, &c., and called '*The Three Sisters*,' originally a part of *Christian Temple, Manor, Hard Frost, and Taylor's Thicket*, containing, &c., together with the improvements and appurtenances thereunto belonging, then this obligation to be void, and of none effect, else in full force and virtue in law."

At the foot of the bond was written :

"Received, 19th day of November 1839, of *Elkanah Franklin*, by the hand of *Francis E. Dunnington*, the amount of the above bond, say, two hundred and fifty dollars, for the use of *Mary C. Speake*.
BENNETT DYSON."

At August court 1844, the writ of injunction was ordered as prayed.

Brawner and wife, vs. Franklin, et al.—1846.

The answer of *William H. Brawner* and *Mary C.*, his wife, alleged: that the said *Mary C.* while an infant, and so young as to be entirely incapable to understand in a proper manner, any matters of business appertaining to sale of real estate, and entirely unacquainted with the value of land, and being also without a guardian, was induced, during her minority as aforesaid, by representations made to her by a certain *Francis E. Dunnington* and others, to agree, that the said *F. E. D.* should make sale of her interest in said land; that said *F. E. D.* did sell at private sale said land to a certain *George Dunnington*, his son; and said *G. D.* afterwards resold the said land to the said *Elkanah Franklin*, mentioned in said bill. That said *G. D.* at the time of the sale of the said land by him to the said *E. F.*, reserved to himself the privilege and right of cutting, and carrying away and disposing of, as he thought proper, all the wood upon said land; selling to said *F.* the soil alone, and reserving to his own use, the whole of the wood and timber then upon the land. That the said *Mary C.* received, or the said *Bennet Dyson*, for her use, from the said *F. E. D.*, the sum of two hundred and fifty dollars, for her interest in said land. That said *Mary C.*, while an infant, as aforesaid, signed the bond made a part of complainant's bill; although so young at the time, and unacquainted with such transactions, as to be entirely ignorant of the character of the instrument she was signing. That these defendants have understood and believe, that said bond remained in the possession of said *Francis E.* or *George Dunnington*, up to the time of the institution of the ejectment suit mentioned in said bill; and although said bond was given and executed to *E. F.* by name, the said *Mary C.* had no transaction about said sale or land with the said *E. F.*, the whole matter, as far as she was concerned, being transacted with the said *F. E.*; that the said tract of land, while in the possession of the said *Mary C.*, tenant as aforesaid, and before the sale thereof was made, as aforesaid, was heavily wooded; and that the chief value of said land consisted in the large quantity of wood and timber upon it; that said land lies very near, or borders on the *Potomac River*, and is very convenient to ship wood to the market of

Brawner and wife, vs. Franklin, et al.—1846.

the *District of Columbia*; that the said land thus covered with wood, was chiefly valuable on account of the wood thereon; that the interest of said *Mary C.* in said land, was worth a great deal more than the sum received by her, while the land was covered with wood. That the said *G. D.* in accordance with the right he reserved to himself, at the time of the sale by him to said *Franklin*, has cut and carried away the greater part of the wood from said land; and these defendants have been informed and believe, that he is still engaged in cutting and carrying away the residue of the said wood still remaining upon the said land; that the value of the wood thus cut and carried away by said *G. D.* is much more than the whole amount received by said *Mary C.*, and her sister, *Margaret F.*, for their interest in said land. That said *E. F.* knew, at the time he purchased said land from said *D.*, that said *Mary C.* was an infant, and incapable to execute a valid deed; and that said *Dunnington* had purchased said land, or her interest therein, from said *Mary C.*, while an infant, as aforesaid; that these defendants would be willing to refund the \$250, received by the said *Mary C.* if the said land could be restored to them in the same state that it was at the time said *Mary C.* was induced to consent to the sale aforesaid; but they are not willing to pay back the \$250, and take the land as it now stands, since all that made the land valuable, the wood and timber, has been taken off said land. These defendants therefore consider that advantage was taken of the infancy and inexperience of said *Mary C.*, in inducing her to consent to the sale of said land for much less than its real value, and much less than said land would have brought, if put up at public sale, at a time when she was ignorant of the value of said land; and that a large profit was made upon the resale of said land; all which is against equity, and which operated as a fraud upon said *Mary C.*; that said *Mary C.* at the time of the sale, as aforesaid, was an infant, and under the age of twenty-one years, that is to say, of the age of seventeen years, or thereabouts; all which premises these respondents plead, and rely on, as a sufficient bar and answer to the said complainants bill; and they pray that the injunction be dissolved, &c.

Browner and wife, vs. Franklin, et al.—1846.

The answer of *Bennett Dyson* alleged, that the said *Mary C.*, while an infant as aforesaid, was induced, principally by the representations of a certain *Francis E. Dunnington*, to consent that said *F. E. D.* should sell said land; that said *F. E.* did sell said land to his son, *G. D.*, and that said *G. D.* afterwards resold the same to said *E. F.*; that said *F. E.* paid to this respondent the sum of five hundred dollars, for the use of said *Margaret F.* and *Mary C.*; and this respondent has since paid the said sum of money to the respective husbands of the said *Mary C.* and *Margaret F.*, who have since married, to wit, the sum of two hundred and fifty dollars, to the said *William H. Browner*, and the sum of two hundred and fifty dollars to *Robert W. Hanson*, the husband of *Margaret F.*; that this respondent did sign the said bond, made a part of complainant's bill, supposing that the said *Mary C.* would ratify said sale when she should arrive at the age of twenty-one years; that the whole of this transaction was with said *Francis E.*, although the said *Elkanah Franklin's* name is the obligee in said bond. That this respondent knew nothing of the value of said land at the time of the sale as aforesaid; but supposed from the representations of said *Francis E.* and others, that it would be advantageous to the said *Mary C.* and *Margaret F.* that said land should be sold, and he was thereby induced to sign said bond as security, as aforesaid, and as, &c.

Upon the bill and answers, the defendants, *Browner and wife*, moved the county court to dissolve the injunction, and dismiss the complainant's bill, which that court refused to do; and they appealed to this court.

The cause was argued before DORSEY, SPENCE and MARTIN, J.

By J. JOHNSON and C. McLEAN, for the appellants, and
By CAUSIN and RANDALL, for the appellees.

DORSEY, J., delivered the opinion of this court.

It is a general and well settled principle, as well at law as in equity, that no person under the age of twenty-one years, is com-

Brawner and wife, vs. Franklin, *et al.*—1846.

petent to make a contract, binding upon him, unless it be for "necessaries." Until his arrival at that age, the law presumes his incompetency to protect his interests, and manage his own concerns; and therefore casts around him its protection and guardianship, as to all his contracts. No executory contract, by him, *bona fide*, entered into, during his minority—unless confirmed by him after arriving at years of maturity—can be decreed to be specifically performed, by a court of equity; or enforced, in a court of law. Nor, in the absence of such confirmation, when pursuing his legal rights, in contravention of such contract, can he be restrained from so doing, by a court of equity interposing a prohibition, by way of injunction. Such an interference, to restrain the violation of a contract, is only warranted, where the contract is susceptible of enforcement in a court of law; or in a court of equity. In the case before us, neither the contract, as disclosed by the bill, or as shewn by the bill and the answer of *Brawner and wife*, when opposed, as it is, by the defence of infancy, can be of any avail to the complainants, either at law or in equity. It would thence seem to follow, that the injunction, which has issued, ought to be dissolved; and that the bill should be dismissed: no equity appearing, to entitle the complainants to the relief they have sought. But it is insisted, that although the right to a specific performance cannot be established, nor a continuance of the injunction be granted, as ancillary thereto, yet, that the injunction to stay proceedings at law, ought to be continued, until the purchase money paid for the land has been repaid by *Brawner and wife*. In support of such a position, no sufficient authority has been referred to: and it is believed that none can be found. It would be at war with the whole theory of the law, as respects the invalidity of contracts by infants. The law imputes to an infant, an incapacity to assume responsibilities, or incur debts, unless it be for necessities; and denies to him a legal capacity to borrow money, because he is incompetent to make of it, an advantageous or judicious application. But establish the doctrine now contended for, and what is the necessary result? Why, that the whole policy of the law, as to infantile incompetency to sell, waste, and dispose of their property and estates, is frustrated and anni-

Brawner and wife, vs. Franklin, *et al.*—1846.

hilated: the alleged guardianship and protection thrown around them by the law, is a mere mockery, existing but in name. An infant may sell his patrimonial estate; prodigally waste the purchase money, in extravagance, gambling, and dissipation; and if, when arrived at years of maturity and discretion, he disaffirm the contract, and sues at law for the recovery of his property, a court of equity will, by injunction, arrest the arm of the law, and say to him, before you shall further assert your claim to your estate, you must repay to the purchaser all the money you have received from him. And, upon the same principle, an infant who borrows money, and mortgages his estate to secure its repayment, and after arriving at full age, and disaffirming his act, seeks at law the reclamation of his property, in chancery he will be enjoined from all other further proceedings at law, in the assertion of his rights. And if there be reason, consistency or justice in the proceedings of a court of equity, whenever he, who when in infancy has contracted a debt, and being sued for it at law, sets up infancy as a defence to the action, a court of equity should interpose by way of injunction, and prohibit his thus defending himself, until he has restored to his creditor, that which he received as the consideration of his indebtedness. Under such a system of equity jurisprudence as this, the only difference between an adult, and an infant mortgagor, seeking a redemption of their property, is this, the former goes into chancery, voluntarily, as a complainant; the latter is dragged in, compulsorily, as a defendant. When there, the protection and relief extended to each, is substantially the same. To such a repudiation of all material discrimination, between the contracts of infants and adults, this court is not prepared to subscribe.

In reviewing the decisions upon the subject, *Justice Story* appears to have arrived at correct results. In page 26, section 42, of *Story on Contracts*, he states, that “the true rule seems to be, that when articles are furnished to the infant, which do not come within the definition of ‘necessaries,’ and which are consumed or parted with; or when money is lent, which is expended by the infant; that the other party has no remedy to recover an equivalent for the goods, or the money:

Brawner and wife, vs. Franklin, et al.—1846.

the specific consideration given by him, being parted with, or not being capable of return. But wherever that specific consideration, whatever it be, exists, and remains in the hands of the infant at the time of his disaffirmance of the contract, and is capable of return, the infant is bound to give it up; and he is treated as a trustee of the other party, if the contract be made originally in good faith. The ground of such a distinction is, that in the first case, the goods or money cannot be returned; and to make the infant liable therefor, in damages, merely because they had been used by him, would be to deprive him of his privilege of affirming, or avoiding, his contract.” And in page 27, section 43, of the same book, it is stated, that “every person deals with an infant at arms length, at his own risk, and with a party for whom the law has a jealous watchfulness.” But although an adult cannot enforce an executory contract, upon which he has advanced the consideration, nor recover it in an action of assumpsit, where the specific and identical consideration has been parted with by the infant; yet this rule operates in some measure reciprocally; for if the infant have already advanced money upon a contract, which is executory on the part of the adult, he cannot disaffirm it, and sue the other party for the advance, whenever it was paid on a valuable consideration, which has been partially enjoyed; and especially, if he had received the benefits of his contract.

The complainants, by the statements in their bill, having failed to shew themselves entitled to an injunction, or any equitable relief whatever; and the defectiveness of their bill being wholly unaided by the admissions in the answer of *Brawner and wife*, the court below might have granted the motion of the appellants to dissolve the injunction, and dismiss the bill filed by the appellees, without giving to them any serious cause of complaint.

That the answer of the co-defendant, *Dyson*, is no evidence against *Brawner and wife*, is so conclusively settled by repeated adjudications of this court, that it is unnecessary to refer to them in the decision of such a question. This court, therefore, might content itself with a simple reversal of the decision of the court below, and passing a decree dissolving the injunction, and

Geiger vs. Green.—1846.

dismissing the bill of complaint. But seeing from the answer, that if the case be remanded to the county court, the complainants may, by an amended bill, possibly, nay, probably, shew themselves entitled to an injunction against *Brawner and wife*, to stay their proceedings at law, during the life of *William H. Brawner*, this court will sign a decree reversing the decision of the county court, and dissolving the injunction; and remanding the case to the county court as a court of equity, that such further proceedings may be had therein, by way of amendment, or otherwise, as may be necessary to prepare the case for a final decree upon its merits.

JUDGMENT REVERSED AND CAUSE REMANDED.

CHRISTOPHER GEIGER, AND JOSEPH AND EDWARD PATTERSON, ET AL., vs. RICHARD GREEN.—*December 1846.*

Where the object of a bill in equity is to obtain specific performance of a contract, and the writ of injunction is prayed for only to protect the property, the subject of the contract, against the wrongful acts of the defendant, pending the contest, and until the right to specific performance shall be determined, that writ cannot be maintained, unless the case presented by the bill, would authorise a court of equity to enforce the contract.

Specific performance of a contract, is not a matter of right in the parties, but depends upon the sound and reasonable discretion of the court; is granted or withheld according to the circumstances of the case; and the court must be satisfied, that the contract sought to be enforced is fair, just, and reasonable, equal in all its parts, and founded on an adequate consideration.

O granted to R, “the privilege of digging and moving the ore on that part of my (O’s,) place, joining W and P’s, at twenty-five cents per ton, for the privilege of ground; leave also to build a house on said land, the workmanship to cost, &c., the materials to be got on my (O’s,) land, at R’s expense.” This confers the mere privilege of digging ore; is not compulsory; imposed no corresponding obligations on R, who might refuse to work the mine, and O could not oblige him to work it. It contains no mutual or reciprocal engagements, and cannot be specifically enforced in equity: consequently there was no ground for granting or continuing an injunction upon its stipulations.

Upon an appeal against continuing an injunction, if the Court of Appeals perceives that the complainant has, and can have, no equity at final hearing, the bill will be dismissed.

Geiger vs. Green.—1846.

APPEAL from the Court of Chancery.

On the 8th July 1846, *Richard Green* relying upon the following agreement, to wit :

“BALTIMORE COUNTY, 10th December 1838.

“I hereby grant to *Richard Green*, the privilege of digging and moving the ore on that part of my place joining *Wilderson* and *Price's*, at twenty-five cents per ton for the privilege of ground; leave also to build a house on said land, the workmanship to cost \$100, the materials to be got on my land, at said *Green's* expense.

“CHARLOTTE C. D. OWINGS.

“*Jas. W. Owings.*”

“RICHARD GREEN.”

Filed his bill, setting forth the same; that in virtue thereof, he entered upon the land of the said *C. C. D. O.*, and dug large quantities of ore therefrom, and paid her for the same; and should have continued to raise ore therefrom, but for an accidental mental affliction, which rendered him incapable of attending to business; that while he was so incapacitated, *Christopher Geiger*, acting on behalf of himself and others, &c., represented to *C. C. D. O.*, that the appellee had abandoned his contract, and, by misrepresentation, induced the said *C. C. D. O.* to enter into some arrangement to sell to the said *C. G.* and others, a portion of the lands comprised in her agreement with him; that *Geiger* and his partners had full notice of the agreement, &c., with the appellee, when they made their agreement; that the said *C. G.* and partners, are now raising ore, and unless restrained, will deprive the said *R. G.* of all benefit of his contract. Prayer, for subpœna.

The county court, (ARCHER, C. J.,) awarded an injunction, on bond being filed.

The answer of *C. C. D. Owings* admitted the bill

After the coming in of the other answers, none of which denied *the contract* relied upon in the bill, nor *notice* of the existence of some agreement between the said *C. C. D. O.* and *Richard Green*, but did deny all misrepresentation charged in the bill, a motion was made to dissolve the injunction. This motion, the chancellor, (BLAND,) on the 5th November 1846, overruled, and continued the injunction until final hearing.

The defendant appealed to this court.

Geiger vs. Green.—1846.

The cause was argued before DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By OTHO SCOTT and JOHN NELSON for the appellants, and
By MEREDITH and REVERDY JOHNSON for the appellees.

MARTIN, J., delivered the opinion of this court.

This case comes before us by an appeal from an order of *Baltimore* county court, as a court of equity, granting an injunction restraining the appellants from digging iron ore on certain lands in that county, and also from an order passed by the court of chancery, to which the cause was transferred, continuing the injunction until final hearing, and presents for our consideration the meaning and operation of the agreement of the 10th of December 1838.

This contract, which appears to have been executed by *Charlotte C. D. Owings* and the appellee, is in these words :

“I hereby grant to *Richard Green*, the privilege of digging and moving the ore on that part of my place joining *Wilder-son’s* and *Price’s*, at twenty-five cents per ton, for the privilege of ground; leave also to build a house on said land, the workmanship to cost one hundred dollars, the materials to be got on my land, at said *Green’s* expense.”

The original bill, after reciting this contract, and alleging, that the complainant had dug under it, a considerable quantity of ore, and was arrested in his operations by an affliction which incapacitated him, till within about four months before the institution of the suit; and that during that period, an arrangement was accomplished, through misrepresentation, by *Christopher Geiger*, in behalf of himself and the other defendant, with *Charlotte C. D. Owings*, for a portion of the lands covered by the contract of the 10th of December 1838, of which *Geiger* had notice; and that the defendants were engaged in raising ore on this land, seeks a specific performance of the agreement, and prays, that the defendants may be restrained from raising and removing the ore.

On the 27th of July 1846, the complainant filed a supplemental bill, which contains a narration of the facts set forth in the original bill, without any material variation, but supplies

Geiger vs. Green.—1846.

an important omission in the first bill, by praying specifically for the writ of injunction. This bill was supported by the affidavit of the complainant, and a bond having been given, as required by the court, an injunction was ordered, on the 24th of July 1846.

It is apparent, from an examination of these bills, that the object and purpose of the complainant, was to obtain a specific performance of the agreement of the 10th of December 1838, and the conservative power of the court was invoked, only to protect the property, the object of the contract, against the alleged wrongful acts of the defendants, pending the contestation, and until his right to a specific execution of this contract was finally determined. As the writ of injunction was granted, as auxiliary to the principal relief sought for by the complainant, it follows, that the order granting the injunction cannot be maintained, unless the case presented by the bills is of that character, which would authorise a court of equity, in the exercise of its extraordinary jurisdiction, to enforce the contract.

It is an acknowledged principle in the exercise of that branch of equity jurisprudence, which respects the specific performance of contracts, that it is not a matter of right in the parties, but the application is addressed to the sound and reasonable discretion of the court; it is granted or withheld according to the circumstances of the case, and a court of equity must be satisfied that the contract sought to be enforced, is fair and just, and reasonable, and equal in all its parts, and founded on an adequate consideration, before the court will interpose with this extraordinary assistance.

In the case of *Seymour against Delancey*, 6 *John. Ch. Rep.*, 224, the chancellor of *New York* said :

“Is it the dictate of sound legal discretion, that this agreement should be specifically carried into execution by the authority of this court? It is an application to sound discretion. This has been the uniform language of the courts of equity. It is not a case requiring the aid of the court, *ex debito justitiæ*. It is a settled principle, that a specific performance of a contract is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances.”

Geiger vs. Green.—1846.

In defining the power and duty of a court of equity, in the exercise of this portion of its jurisdiction, the lord chancellor, in the case of *Radcliffe against Warrington*, 12 *Vesey*, 331, announced :

“That the question was, not what the court must do, but what it may do, under circumstances, either exercising the jurisdiction by granting the specific performance, or abstaining from it.”

In *German against Machin*, 6 *Paige*, 292, the court determined: “That, to entitle a party to a specific performance, the agreement which is sought to be enforced, must not only be certain in its terms, but there must be mutuality in its character.”

In *Boucher against Van Buskirk*, 2 *A. K. Marsh. Rep.*, 346, the court said: “That the general rule is well settled, that, to enable either party to compel a specific execution, the contract must be mutually binding on each.”

In *Moore’s administrators against Fitz Randolph*, 6 *Leigh R.*, 185, the court declared: “That the contract must be mutual, otherwise equity will not execute it, that is, both parties must have, by the agreement, a right to compel a specific performance, according to the advantage which it might be supposed they were to derive from it.”

The same doctrine is stated by *Lord Redesdale*, in *Lawrenson against Butler*, 1 *Sh. & Lef.*, 18, where he says :

“I have no conception, that a court of equity ought to decree a specific performance in a case, except where both parties had, by the agreement, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it, because, otherwise, it would follow, that the court would decree a specific performance, where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him, he would be liable to the performance, and, yet, if advantageous to him, he could not compel a performance.” This, he says, “is not equity.”

The same principle is affirmed in the case of *Bromley against Jeffries*, 2 *Vernon*, 415; and it is now established, that unless there is to be found in the contract, this essential ingredient of

mutuality, a court of equity will not compel its specific execution.

This constitutes an insuperable objection to the specific performance of the agreement under consideration. It is true, that as this mine was worked, and ore raised from it by the appellee, an obligation to pay twenty-five cents for every ton that was produced, would be created. But the contract grants to the appellee the mere privilege of digging ore, and is not compulsory in its character; a privilege, to be exercised, or not, at his pleasure, imposing no corresponding obligations; and if the appellee considered the agreement into which he had entered injurious, and refused to work the mine, it is apparent from every part of this paper, that the proprietor possessed no power to enforce in a court of equity an observance of the contract.

The practical operation of an agreement of this description, is, that while the appellee may use the mine, if he finds it productive, he may refuse to do so, upon discovering that his purchase is disadvantageous, and the owner of the property would be deprived for years of the revenue, which, under other circumstances, might be derived from it.

A contract so unequal in its stipulations and bearing, which binds one party, while it leaves the other unfettered, as it respects the observance of its terms, in which there are to be seen no mutual or reciprocal engagements, and which must be regarded, therefore, as unreasonable and inequitable, can never be enforced by a court of equity.

As it is perfectly clear, that the contract, which forms the subject of the present suit, could not be enforced in equity, and that the court would have dismissed the bills, at the final hearing, there could be no ground for granting an injunction, the object of which, was to protect the property, pending the controversy, in reference to the specific execution of the agreement. We think, therefore, that the county court erred in granting the injunction, and that, for the reasons already assigned, the chancellor was in error in continuing it.

Various questions were raised by the answers of the defendants, and discussed by the counsel in the progress of the argument, in reference to which it has become unnecessary to

Buck vs. Doyle.—1846.

express an opinion, as we think that the case presented by the bill, did not entitle the complainant to the interposition of a court of equity.

The order of *Baltimore* county court, as a court of equity, granting the injunction, and the order of the chancellor continuing it, are reversed, with costs, and a decree will be signed reversing these orders, and dismissing the bills of complaint.

ORDERS REVERSED, AND INJUNCTION
DISSOLVED, AND BILL DISMISSED.

BENJAMIN A. BUCK vs. MICHAEL DOYLE.—December 1846.

The doctrine of *caveat emptor*, does not apply to brokers dealing in bank notes of the other States. Both parties being equally innocent in such a transaction, having equal means of knowledge, and the usage being, that the purchaser may rely upon the skill of the vendor in detecting counterfeits, the former may recover from the latter the sum paid him for such paper, it proving to be forged.

The purchaser may lose his right of recovery by laches.

But where the purchaser has parted with such paper, *bona fide*, and for value, and knows nothing of the forgery, he is not guilty of laches, if, on claim being made of him, he refunds his vendee, and thereupon tenders the forged paper to his vendor, and requires him to refund.

APPEAL from *Baltimore* county court.

This was an action of *assumpsit*, brought to September term 1844, by consent of parties, by the appellant against the appellee. The cause was heard upon the general issue. The jury found a verdict for the plaintiff, under the instructions of the county court, for \$208.26.

Upon the trial of this cause, the plaintiff offered in evidence, by *Upton Buck*, that he was a clerk in the exchange and broker's office of the plaintiff during 1844; that on the 24th May 1844, at about half-past eight o'clock, A. M., a youth, who was then a clerk in the office of the defendant, who was at that time, and still is, an exchange broker, and which said clerk was known to the plaintiff at that time to be a clerk in the office of the defendant, called at the office of the plaintiff with five notes, purporting to be notes of the *Planter's Bank*

Buck vs. Doyle.—1846.

of *Tennessee*, each of the denomination of one hundred dollars, and asked the plaintiff, at what rate he would discount said notes? that said plaintiff informed said clerk of the defendant, that he would discount them at three per cent.; upon which the said clerk of the defendant remarked, that *Mr. Harris*, another broker, had offered to discount said notes at two and-a-half per cent., and give his check for the amount less said discount, but that offer was declined, because *Mr. Doyle*, the defendant, wanted the money for a person about to leave town in the nine o'clock cars, and that a check would not answer, as *Mr. Doyle*, the defendant, wanted the money; that the plaintiff, upon receiving this information, agreed to discount said notes at two and-a-half per cent., and paid to said clerk of the defendant, in *Baltimore* bank notes, the amount of said notes, less the discount aforesaid. That the plaintiff did not particularly examine said notes, for the purpose of ascertaining whether they were counterfeit or not, because he was informed by the clerk of the defendant, that they came from the office of the defendant, who was known to the plaintiff to be a regular broker, and *that it is not usual among brokers, to inspect notes which they receive from each other, as closely as if they were received from a stranger, because they all suppose each other to be equally good judges of notes; and take it for granted, that if spurious notes are even received by one from another, that the mistake will be corrected, and that such is the usage among brokers in the city of Baltimore*; but, that if the plaintiff had examined said notes closely, with a view to determine whether they were genuine, he might and probably would, have discovered, that said notes were counterfeit.

The plaintiff further proved by said witness, that the said five notes were placed in the money-tray of the plaintiff, and there remained for a short time, when they were all passed by the plaintiff to a certain *Joseph E. Husbands*, under a special agreement; and further proved by said witness, that the five notes now shewn to him, purporting to be notes of the *Planter's Bank of Tennessee*, each of the denomination of one hundred dollars, are all counterfeit.

Buck vs. Doyle.—1846.

The plaintiff further offered in evidence, by *Joseph E. Husbands*, a competent witness, that he is by profession an exchange broker; that in the latter part of May 1844, he purchased from the plaintiff five notes, purporting to be notes of the *Planter's Bank of Tennessee*, each, &c.; that he obtained the said notes from the plaintiff, upon a special agreement, which was, that said witness should pay said plaintiff the amount, less one per cent. discount, of so much of said five notes, as said witness would be able to dispose of in the western country, whither he was going to buy produce; and that so much of said five notes as remained undisposed of by said witness, the plaintiff was to receive from him, upon his return to *Baltimore*, at one and-a-half per cent. discount; the account between witness and the plaintiff, to be settled upon the return of witness to *Baltimore*. That the witness went to the city of *Pittsburg*, and there sold three of said notes so received from the plaintiff, to a certain *William Larimer*, a broker in said last mentioned city; and not being able to dispose of the other two of said five notes, returned them to the plaintiff, in pursuance of their contract aforesaid; that at the time he received said notes of said plaintiff, and also at the time he returned the two, aforesaid, to the plaintiff, the said witness, nor the plaintiff, as the said witness believes, had no suspicion that any of said notes were counterfeit; that he did not examine them with any attention when he received them, or he would have discovered the forgery; and that the only notes the said witness had in his possession of, or purporting to be notes of, &c., upon his said trip to *P.*, were the said five notes which he received of the plaintiff, as aforesaid. That shortly after the return of said witness from *P.*, he was informed by the plaintiff, that he was fearful there was something wrong about said two notes; that a man had been arrested for passing counterfeit notes upon the *Planter's Bank of Tennessee*; and that said witness and the plaintiff having discovered the two notes, then in the possession of the plaintiff, to be counterfeit, went before *Mr. Miltenberger*, a justice of the peace of *Baltimore*, and made the affidavits annexed to the two notes marked A and B, &c.

That witness is not able to identify said two notes as the same which he returned to the plaintiff, upon his return from *Pittsburg*, as aforesaid, because he put no mark upon said two notes; and the plaintiff further gave in evidence, by the last mentioned witness, that the first information he had, and, to the best of his belief, that the plaintiff had, that the three of said notes which witness passed off in *P.*, were counterfeit, was on or about the 3d August 1844, when he met, at the cars, *Mr. Larimer*, to whom he had passed them, and who then, for the first time, told him said three notes were counterfeit; that upon receiving this information, said witness referred said *Larimer* to the plaintiff, as the person from whom said witness had received said notes, and that on that day, the plaintiff paid said *Larimer* the amount which he had paid for said three notes, and took said three notes.

The plaintiff further offered in evidence, by *Upton Buck*, that the plaintiff never had in his possession any notes of the *Planter's Bank of Tennessee*, of, &c., nor any notes purporting to be notes of that bank, of, &c., except the five notes which he passed to said *Husbands*, as aforesaid; and that the two notes, marked A and B, hereinbefore inserted, are the two notes which said *Husbands* returned to said plaintiff, upon his return from *P.*, as aforesaid, and the same notes with reference to which the affidavits thereto annexed were made.

And the plaintiff further offered in evidence the deposition of *William T. Sprigg*, who proved the notes counterfeit, and *Doyle's* admission, that if they were the same notes he sold plaintiff, and counterfeit, he would have to pay them.

The plaintiff further offered in evidence a commission, and testimony taken under it in *Pittsburg*, for the purpose of identifying the notes in controversy, which the proof tended to do.

The defendant prayed the court to instruct the jury as follows :

1st. That in order to find for the plaintiff in this case, they must believe from the evidence in the cause, that the money paid by the plaintiff on the purchase of said notes, was received by the defendant, or some person for him, in that behalf duly authorised.

Buck vs. Doyle.—1846.

2d. That if they shall find, that the plaintiff is an exchange broker of established character, as such as a person of experience and skill in said business, and a competent judge of bank notes, as to their genuineness; and shall also find in the cause, that a competent judge of bank notes, by the exercise of ordinary care in the examination and inspection of said notes, at the time they were offered for sale to the plaintiff, could and would have detected them as counterfeits, and that the plaintiff himself, or his said clerk, *Upton Buck*, by the exercise of ordinary care and prudence in the examination and inspection of said notes, at the time they were so offered to the plaintiff, could and would, have detected them as counterfeit; and shall further find, that said notes were so received by the plaintiff at the time they were so offered, without the exercise of ordinary care, in the examination and inspection of said notes, on the part of the person receiving the same, and without the application of the actual skill and experience of the said plaintiff, or of his said clerk, in the examination and inspection of the same; and shall further find, that the plaintiff and his said clerk had full opportunity to examine and inspect the same, before said notes were handed to the witness, *Mr. Husbands*, and that they neglected to make such inspection and examination as aforesaid; and shall also find from the evidence in the cause, that the person who offered said notes for sale, and also that the defendant, acted *bona fide*, without knowledge or suspicion, and without any grounds to believe or suspect, that said notes were otherwise than genuine, then the plaintiff is not entitled to recover.

3d. That if they shall find the several facts set forth in the defendant's second prayer, as the hypothesis of that prayer; and shall also find, that the plaintiff's business principally consists in buying and selling bank notes, of the issues of foreign banks; and shall also find from the evidence in the cause, that the said notes offered in evidence, were offered for sale to the plaintiff, in the usual course of business, at his counter; and shall further find from the evidence in the cause, that the omission to detect said notes as counterfeit, at the time they were received, and afterwards, whilst they remained in the

possession of the plaintiff, before their delivery to the witness, *Mr. Husbands*, and at the time of their delivery to *Mr. H.*, was the result of negligence on the part of the said plaintiff and of his said clerk, then the plaintiff is not entitled to recover in this case.

4th. That even if they shall find from the evidence in the cause, that the person who presented said notes at the counter of the plaintiff, was a lad at that time, in the service of the defendant, as a clerk in his business; and shall also find from the evidence, that they were presented by said lad, at about half-past eight o'clock in the morning, with a statement, that *Mr. Doyle*, the defendant, desired them to be discounted for a person who was about to leave in the 9 o'clock cars of that day; but shall also find, that the business of the defendant is that of a vendor of lottery tickets, in conjunction with the business of an exchange broker, and that his office and place of business is in *Pratt* street, then the acts and declarations of said clerk of the defendant, are not sufficient, *per se*, to shew that he was authorised by the defendant, *quo ad*, the sale of said notes, to act on his behalf, and that unless the jury shall find from the evidence in the cause, proof of antecedent authority, or subsequent ratification on the part of the defendant, it is not to be presumed merely from the relation subsisting between his said clerk and the defendant, that the said clerk had authority in this particular transaction to act on behalf of the defendant in the sale of the said notes, or in the receipt from the plaintiff of the price thereof.

5th. If the jury shall find the facts set forth in the preceding prayers, as the hypotheses respectively of said prayers; and shall also find from the evidence in the cause, that said notes, after they had been so received by said plaintiff, were by him retained for several days in his possession, and then delivered to the witness, *Mr. Husbands*, under the terms and provisions of the special agreement, proved by said *Husbands* in his evidence; and shall further find from the evidence in the cause, that the said notes were received by said *Husbands*, without the exercise of ordinary care on his part in the examination and inspection of said notes, from his confidence in the judg-

Buck vs. Doyle.—1846.

ment, experience, circumspection and care of the said plaintiff in business; and shall further find, that said *Husbands* then was a person of skill and judgment in the knowledge of the character of bank notes, and that by the exercise of this actual skill and knowledge which he possessed, he could and would, with ordinary care and circumspection, have detected these notes as counterfeit; and shall further find from the evidence in the cause, that said *Husbands* carried said notes with him to *Pittsburg*, and there disposed of three of said notes to a clerk of a certain *W. Larimer*, in *Pittsburg*, on the 28th day of May 1844, without the exercise of ordinary care at the time they were so passed away, either by said *Husbands*, or said clerk of said *Larimer*, in the examination and inspection of said three notes; and shall further find from the evidence, that said *Larimer* kept an exchange office in *Pittsburg*, and that his said clerk there was a good judge of the genuineness of the notes of the particular bank of which said three notes purported to be the issue, and that said notes were so passed by said *Husbands*, in the usual course of business, and that said clerk received the same, without the exercise of ordinary care in the examination and inspection of the same, from his confidence, in his opinion, of the skill and care of *Mr. Husbands*, from whom he received them; and shall further find from the evidence, that the said *Husbands*, and said clerk of said *Larimer*, by the exercise of ordinary care and circumspection, at the time said notes were passed to said clerk by said *Husbands*, or by the exercise of the actual skill and care of either, could and would, have detected said notes as counterfeit; and shall further find from the evidence in the cause, that said three notes were not returned by said *Larimer*, or his said clerk, or by said *Husbands*, to the said plaintiff, until the 3d day of August 1844, and were not tendered to the said defendant to be returned to him, until after the same were so returned to the plaintiff; and shall further find from the evidence in the cause, that the said *Husbands* had returned from *Pittsburg* to *Baltimore*, as early as the 3d day of June 1844, and that said plaintiff and said *Husbands* then knew or believed, or had reasonable grounds to suspect and believe, that said notes were counterfeit;

Buck vs. Doyle.—1846.

and shall further find from the evidence in the cause, that no communication was made by the said plaintiff, or said *Husbands*, to said *Larimer*, or his said clerk, or by said *Larimer*, or his said clerk, to said plaintiff, or said *Husbands*, in relation to said three notes, until the latter end of the month of July 1844, then the plaintiff is not entitled to recover in this case, in respect of said three notes so passed by said *Husbands* to said clerk of said *Larimer*.

The court, (PURVIANCE and LE GRAND, A. J.,) rejected the 2nd and 3rd, and granted the 1st, 4th, and 5th prayers of the defendant; to the granting of the 5th prayer of the defendant, the plaintiff excepted.

The plaintiff having recovered less than his demand under the directions of the court, as given to the jury, prosecuted the present appeal.

The cause was argued before CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By TEACKLE for the appellant, and

By WILLIAM SCHLEY for the appellee.

MAGRUDER, J., delivered the opinion of this court.

This action was brought in *Baltimore* county court, by the appellant, to recover back from the defendant money paid by him for bank notes, which proved to be counterfeits. These notes, it is to be taken for granted, were counterfeit, and were received by the plaintiff of the defendant, in exchange for other money which was good.

The notes were received by the plaintiff on the 24th May 1844, and a few days afterwards, were passed away to one *Husbands*, who went to *Pittsburg*, and there sold three of said notes to one *Larimer*. *Husbands*, upon his return, brought with him, and delivered to the plaintiff, the other two. Whether, upon the latter, a recovery can be had, is not a question before us. The amount of them was recovered, and it is only to be enquired now, whether the plaintiff is entitled to recover of the defendant the money which he paid for the other three. These were offered to defendant on the 3rd of August.

Buck vs. Doyle.—1846.

On the part of the defendant it is insisted, that the maxim, *caveat emptor*, applies to this case, and that the plaintiff cannot recover, because, by the exercise of due diligence, he might have discovered that the notes were counterfeit. The court is not of this opinion. The defendant, as well as the plaintiff, was a broker, equally skilled in the business of detecting counterfeit notes, and cannot rely on such a defence. It would appear, that the plaintiff might have relied, and the usage among brokers authorised him to rely, upon the skill which the defendant possessed in detecting counterfeits. The parties must be considered as equally innocent; their knowledge and their means of knowledge were the same. If, then, it had been discovered, that these notes were counterfeit, and had been returned immediately after they were received, the plaintiff's right to recover in this suit the amount paid for them, could not be questioned.

The enquiry then is, whether, by reason of any laches on his part, the plaintiff has lost his right to recover in this case? We are not informed, what became of these notes after they were passed away by *Husbands* to *Larimer*, and until the return of them to the plaintiff, something more than two months after *Husbands* parted with the possession of them. There is no ground for a presumption, that they were within the reach of the plaintiff, before the return of them to him. It cannot, therefore, be said, that he was guilty of any laches, which would furnish the defendant with a valid defence. The latter undertook to furnish the plaintiff with notes of the *Planter's Bank of Tennessee*, and received therefor a valuable consideration. The paper which he furnished, was not what he undertook it to be, and was of no value. Surely, then, upon every principle of equity, he is bound to refund, unless he can show, (and in this he has failed,) laches on the part of the plaintiff. If the case was *res nova*, we could not assent to the opinion of the court below.

The case of *Key vs. Knott and wife*, 9 *Gill and Johnson*, 342, and that of *Jones and others, vs. Ryde and another*, and some of the decisions, to which a reference is given in the report of those cases, seem to be at war with the decision of the court below.

Burton, *et al.*, vs. Marshall.—1846.

There is in the case proof, that with respect to the two bank notes, returned by *Husbands*, and after the return of them to the plaintiff, he expressed apprehension in regard to them, and demanded the money for them of the defendant. This proof, as set forth in the record, it is thought, weakens the claim of the plaintiff to recover the sum which he claims for the three notes, which are now the subject of controversy. But this, it would seem, is requiring too much of the plaintiff, and is too favorable to the defendant. He was, according to the proof, quite as able as the plaintiff, to judge whether the notes were genuine or otherwise. He put them into circulation, received full value for them, and was quite as likely as the plaintiff, to know from whom he obtained them, and if the three notes were not received by him, at the same time, and from the same person, that the other two were. There is no proof, that the plaintiff withheld from him any information, which he himself possessed, and whatever might have been the law of the case, if the defendant had possessed less skill than the plaintiff, in detecting counterfeit paper, yet, in this case, between brokers, the defendant cannot complain, that the plaintiff is the person who ought to suffer, unless, indeed, other proof can be offered.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

WILLIAM E. BURTON, C. S. T. BURKE AND WIFE, vs.
E. A. MARSHALL.—*December* 1846.

Upon a contract made by a husband for himself and his wife, that his wife should perform at the theatre of the manager named therein, during a certain period, for a certain salary, a court of equity will not enjoin the wife from performing at any other theatre, during the same period; nor the husband from permitting her to change her residence; nor another manager from giving her employment, within the term, as an actress; neither can specific execution of such a contract, as against the husband or wife, be decreed.

Upon a contract, affirmative in all its provisions, the execution of which could not be enforced in equity, a court of equity cannot be asked to engraft upon it a negative stipulation, and restrain its breach by injunction.

Burton, *et al.*, vs. Marshall.—1846.

A court of chancery never lends its aid in furtherance of injustice and oppression.

While a complainant is prosecuting a suit at law, to recover damages for the violation of a contract, it is both unjust and oppressive, at the same time and for the same injury, to seek to visit the defendant, in a court of equity, with the pains and penalties of injunction, by which he might be stripped of all means of subsistence, or violating the injunction, be imprisoned for contempt.

Equity will not listen to a complainant who thus presents himself for relief, until he makes his election in which court he desires to proceed in pursuit of his rights, and has dismissed, or agreed to dismiss, his proceedings in the other.

A party is entitled to recover but one compensation for an injury received.

All the covenants and agreements of a *feme covert*, (except in regard to separate property,) are null and void at law and in equity. She cannot be compelled to perform them, whether entered into by herself, or, on her behalf, by her husband, with or without her consent.

To restrain a married woman by injunction upon the footing of her contract, as if she were single, would, by indirect means, be an abuse of the process of the court.

THIS was an appeal from the equity side of *Baltimore* county court.

The bill, in this case, was filed by *Ethelbert A. Marshall*, on the 8th October 1846, and founded upon the following contract, made by a certain *C. S. T. Burke*, for himself and wife, by which it was alleged she was bound :—

“PHILADELPHIA, 1st May 1846.

“*Charles Burke*, and his wife *Margaret*, now of *Philadelphia Museum*, are engaged to perform under the direction of *E. A. Marshall*, or his agent, at either *The Holliday Street Theatre, Baltimore*, or *The Walnut Street Theatre, Philadelphia*, at a salary of twenty dollars each, for a period of ten weeks, and a joint benefit at either of the cities, they receiving jointly, one-third of the receipts. At the expiration of the said period of ten weeks, (the commencement of which shall be on or about the 9th June, next ensuing,) *Mrs. Burke* is further engaged for the full period of *The Walnut Street Theatre* season, at a salary of \$22 per week: (same in the months of January and February, when the salary shall be \$20 per week, only.) *Mrs. Burke* to have, in the course of *The Walnut Street Theatre* season, (which shall be understood to extend to the 4th July

Burton, *et al.*, vs. Marshall.—1846.

1847,) two benefits, and to receive one-third of the gross receipts of each; and said continuation of the latter engagement, after the before named period of ten weeks, shall also be understood to be either for *Baltimore* or *Philadelphia*, as aforesaid, for *Mrs. Burke* only. C. S. T. BURKE.”

The bill alleged, that *Burke* had refused to permit his wife to perform; had withdrawn her from *M*'s company of performers, and engaged her services to a rival company, in violation of his contract; that *William E. Burton*, manager of the *Front Street Theatre, Baltimore*, with a full knowledge of the contract aforesaid, had engaged the said *Margaret B.* from her husband; and that she is now in the service of the said *Burton*; that the complainant has brought his action at law against the said *Charles* for violation of the contract aforesaid, which he fears will not avail him, from the inability of the said *Charles* to pay any damages, nor could he recover at law adequate damages; that he has requested the said *M.* to return to his service, which she refuses, and her husband refuses to require her to return. *Prayer*, for an injunction against *W. E. Burton*, prohibiting him from suffering the said *M. B.*, during the term of her engagement aforesaid, to perform as an actress in any theatrical corps under the management of the said *Burton*; also against *C. B.*, prohibiting him from removing without the jurisdiction of this court, his said wife, until, &c.; and also against *M. B.* from performing as an actress in any other theatrical corps, during the continuance of the said contract, &c.; and for subpœna.

Upon this bill, *Baltimore* county court, (LE GRAND, A. J.,) ordered an injunction, which was issued, on filing bond in the penalty of \$500.

The defendants all appeared in the cause, and *Burke and wife* filed their joint answer to the bill, which was also answered by *Burton*.

The defendants then appealed, under the act of 1835, from the order granting the injunction, to this court; having first given bond to prosecute their appeal with effect.

Burton, *et al.*, vs. Marshall.—1846.

The appeal was argued before DORSEY, SPENCE, MAGRUDER and MARTIN, J.

By F. P. LOVEGROVE for the appellants; and
By REVERDY JOHNSON for the appellees.

DORSEY, J., delivered the opinion of this court.

In considering the propriety of the injunction before us, it may not perhaps be out of place to refer to some of the familiar and well established rules which should be observed in reference to the issue of such writs. In *2 Story's Eq.*, sec. 959a, it is stated, "that the granting, or refusing of injunctions, is a matter resting in the sound discretion of a court of equity, and, consequently, no injunction will be granted, wherever it will operate oppressively;" "or where it is not the fit and appropriate mode of redress, under all the circumstances of the case; or where it will or may work an immediate mischief." And in sec. 959b, of the same book, the learned commentator says, "it ought, therefore, to be guarded with extreme caution, and applied only in clear cases; otherwise, instead of becoming an instrument to promote the public, as well as private, welfare, it may become a means of extortion, and, perhaps, irreparable injustice."

The appeal in this case, has been taken to the order of the 4th of October 1846, granting the injunction prayed for in the bill of complaint. The bill does not seek a specific performance of the contract, of which it charges the violation, and, therefore, does not ask for the injunction, as ancillary to such a proceeding, or as restraining the violation of the alleged agreement, until a decree for such performance can be obtained. On the contrary it is conceded, as it well might be, both on reason and authority, that such is the nature of the engagement, or contract of *Mrs. Burke*, (if contract it can be called,) that its enforcement in a court of equity, by way of a decree for its specific execution, cannot be obtained. What are the means, then, by which the complainant seeks, through the medium of a court of equity, to coerce *Mrs. Burke* to the observance of her engagement? Why, by the imposition of

Burton, *et al.*, vs. Marshall.—1846.

certain prohibitions, restrictions, pains and penalties, by which she is offered the mild alternative of returning to the service of the complainant; or, (if dependent on her professional labors for a support,) she must either beg her bread, or be incarcerated within the walls of a public prison, and this, too, is to be her condition, without having first given her an opportunity of shewing, (should such be the fact,) that neither legally, equitably or morally, is she under the slightest obligation to return to the service of the complainant. For the granting of such relief in such a case, it is believed, no sufficient authority can be produced.

To sustain the injunction before us, two cases have been referred to by the complainant's solicitor. The first, that of *Martin vs. Nutkin*, 2 *Pr. Will.*, 266, "where certain persons owning a house in the neighborhood of a church, entered into an engagement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning, to their annoyance. The agreement being violated, an injunction was afterwards granted, to prevent the bell being rung at that hour." The second case was, that of *Morris vs. Colman*, 18 *Ves.*, 437, "where, upon the same ground a celebrated play-writer, who had covenanted not to write any dramatic performance for another theatre, was, by injunction restrained from violating the covenant." By so doing, in these two cases, the parties' defendants were required to perform that which, by the express stipulations of their contracts, they were bound to do. The granting the injunctions there, was in effect and substance, if not in form, the decreeing the specific execution of the agreement of the parties, according to the express and unequivocal terms of their compacts. But was such the character of the injunction issued in this case? Did the engagement or contract of *Mrs. Burke*, contain any negative stipulation, that she would not do that which the injunction, issued, prohibited her from doing? Unquestionably not. Her only agreement was to render the services, in the company of the complainant, which were specified in her contract. The injunction, then, did not command the performance of that which was stipulated in the agreement, but prohibited the

Burton, *et al.*, vs. Marshall.—1846.

doing of acts, in relation to which she had made no stipulation. The cases cited, therefore, are not precedents for, and give no countenance to, the injunction issued in this case.

In *Kemble vs. Kean*, reported in 6 *Simons*, 333, and to be found in 9 *Condensed Cha. Rep.*, 296, after a full examination of all the cases upon the subject, the vice-chancellor decided, that where the proprietor of *Covent Garden Theatre* agreed with an actor, that he should act for twenty-four nights, during a certain period of time, at their theatre, and that, in the meantime, he should not act at any other place in *London*, that the court cannot enforce the positive part of the contract, and, therefore, it will not restrain, by injunction, a breach of the negative part. And in *Kimberley vs. Jennings*, 6 *Simons*, 340, and also reported in 9 *Cond. Ch. Rep.*, 300, it was in like manner determined, that where a party agreed not to do a particular act, and there are other terms in the agreement, which are so vague, that the court cannot enforce them, it will not grant an injunction to restrain the breach of the negative term. If these cases are to be regarded as of any authority, upon what principle could the complainant, under a contract affirmative in all its provisions, and the execution of which could not be specifically enforced, ask a court of equity, in effect, to engraft upon it a negative stipulation, the breach whereof was to be restrained by injunction, as if it had formed a part of the written agreement of the parties?

But, conceding for the moment, that if primarily applied to, a court of equity could have granted the relief which has been extended to the complainant, under the circumstances in which it has been sought, it ought not to have been granted. A court of chancery never lends its aid in furtherance of injustice or oppression. Is it not unjust and oppressive in the complainant, whilst prosecuting at law a suit, by which he is to be indemnified for all damage he has sustained by the refusal of *Mrs. Burke* to perform her engagement, that at the same time, and for the same injury, he should seek to visit upon her in a court of equity pains and penalties, by which she may be stripped of all means of subsistence, or be consigned to loathsome imprisonment in jail? Equity will not listen to a complainant

Burton, *et al.*, vs. Marshall.—1846.

who thus presents himself for relief, until he makes his election, in which court he desires to proceed in pursuit of his rights, and has dismissed, or agreed to dismiss, his proceedings in the other. The complainant is entitled to recover but one compensation for the injury he has sustained. That, the law presumes, he will obtain in his action at law; and to that, and nothing more, is he, in any aspect of his case, entitled, either in the contemplation of a court of law or of equity. To him, it is a full and adequate indemnity. In mitigation of the damages to be recovered at law, no losses or sufferings, inflicted upon *Mr.* or *Mrs. Burke*, by the proceedings in equity, can be given in evidence. To them, in such a case, neither law or equity affords any adequate redress. It follows, as a necessary consequence, that the proceedings in both courts, at the same time, should not be tolerated.

In the views thus far expressed, we have treated *Mrs. Burke* as a person *sui juris*, and bound to the performance of the engagement entered into on her behalf, in the same manner that she would have been, had she been a *feme sole*. But such was not her condition. Being a *feme covert*, except in regard to her separate property, all her covenants, contracts, promises and agreements, as well in courts of law, as of equity, are absolutely null and void, and she is under no obligation, and cannot be compelled, to perform them, whether entered into by herself, or on her behalf by her husband, with or without her consent. From this exemption, it results as a corollary, that all proceedings emanating from a court of justice against her, which disclose her coverture, and seek the enforcement of any such contract, are fruitless and illegal. If the issuing of the injunction against *Mrs. Burke*, could, in this case, be sustained, her violation of it, would cause to be visited upon her all the consequences incident to an attachment for a contempt of court; and thus, by indirect means, and the abuse of the process of a court of equity, she would be as amenable for her contracts entered into during coverture, as those made by her *dum sola*.

This court will sign a decree reversing the order of the 4th of October 1846, and dissolving the injunction issued there-

State vs. Sutton.—1846.

under, and dismissing the complainant's bill, with costs, in this court and the court below.

INJUNCTION DISSOLVED AND BILL
DISMISSED, WITH COSTS.

STATE OF MARYLAND vs. WILLIAM SUTTON.—*Dec.* 1846.

A count in an indictment charging a rape, may be united with another count charging an assault, with intent to commit a rape. This is no misjoinder under our system of criminal jurisprudence.

Where an indictment containing two counts, is submitted to the jury upon the plea of not guilty, it is their duty to find both issues in their verdict.

And if the jury find the prisoner guilty upon one issue, as upon the inferior offence, and do not find the other issue, the verdict should be set aside and a new trial awarded.

A verdict which is a nullity, does not, in legal contemplation, jeopard life or limb.

WRIT OF ERROR to *Baltimore* county court.

At November term 1845, the grand jury of said county found a true bill of indictment against the defendant in error, charging him in one count with a rape, and in another count with an assault, with intent to commit a rape. The petit jury found the prisoner guilty of the charge as specified in the second count aforesaid, as, &c., and were thereupon discharged.

The prisoner moved in arrest of judgment, as stated in the opinion of this court, and the county court, (PURVIANCE and LE GRAND, A. J.,) delivered the following opinion :

The court will briefly state the principles which, in this case, induce them to sustain the motion on behalf of the prisoner, and to order his discharge from custody.

The prisoner was indicted by the grand inquest for *Baltimore* county. The indictment contained two counts: the first charging him with the crime of *rape*; the other, with the crime of an *assault* with the *intent* to commit a rape. On this indictment the party was duly arraigned, and pleaded not guilty. The jury was sworn to try the *issues* joined between the prisoner and the State. The attorney for the State made no election:

State vs. Sutton.—1846.

but submitted both issues to the jury for their determination. The jury returned a verdict of “*guilty*,” “on the second count,” but found nothing as to the first.

These being the facts, the questions for the determination of the court are :

1st. Can judgment be rendered on the verdict of the jury?

2nd. If judgment cannot be rendered, is the prisoner entitled to his discharge?

The crime imputed to the prisoner in the first count, is a *felony*;—that imputed in the second is a *misdemeanor*. Before the decision of the Court of Appeals, in the case of the *State vs. Burke*, 2 H. & J., 426, it was contended by as eminent lawyers as were ever known to the profession in this country, that it was not competent for the State to *embrace*, in a single indictment, a *felony* and a *misdemeanor*; but since, and by that decision, an opposite doctrine has been settled, as the law of *Maryland*. Under that decision then, the indictment, in this case, is a good one; and the question is, can the court render judgment on the finding of the jury? A thorough and careful examination of all the cases within our reach, involving in their enquiry this question, warrant, in our opinion, the assertion of the following principles.

First. Where there is a special verdict, and the jury in it find the *substance* of the crime, the court may correct the form, and render judgment.

Second. Where there is one count in the indictment, charging the *same species* of crime in different degrees, as, for example, murder in the first, and murder in the second degree, and the jury find by their verdict, the prisoner guilty of the latter, that such finding is a *negation* of the guilt of the party, of the greater degree of the *same crime*, and the court may render judgment.

In this case, however, the crimes charged in the different counts of the indictment are *not* of the *same nature*; the one is a *felony* punishable by the *death*; the other, a *misdemeanor*, punishable by *imprisonment*. Since the decision in 2 H. & J., 426, a party may, in one indictment, be charged in one count with murder, which is a *felony*, and in

State vs. Sutton.—1846.

another count with *perjury*, which is a *misdemeanor*. If, in such a case, the prisoner were found guilty, by the verdict of the jury, of the *perjury*, it could not be contended that he was not guilty of the *murder*, for he may have been guilty of both: so in the case under consideration, the finding of the guilt of the party, so far as the *misdemeanor* is concerned, is no negation of the guilt of the felony. The jury are sworn to make a “true deliverance” between the State and the prisoner, on *all* matters on which issue was joined. This has not been done, and as those issues involved inquiries in regard to crimes, as distinct in their nature from each other as are murder and perjury, the finding of the misdemeanor could be no negation of the felony; for, *non constat*, the prisoner may have been guilty of both; but un’til found guilty of the felony, he could not be punished for it.

From these views, (and there is not a single authority, so far as the court are aware, in conflict with them,) it must be apparent, no judgment can be rendered on the finding of the jury, and for this reason, if the party were sent to the penitentiary for the misdemeanor, when his term of service expired, he could be tried for the *felony*, and, if found guilty, hung for it; for, as he had not been either acquitted or convicted of it by the finding of the jury, he would still stand charged with it, and liable to be tried for it at any distance of time. He could not, successfully, plead either *autrefois acquit*, or *autrefois convict*, for the truth of either of these pleas could only be tested by the record, which, on inspection, would show, that he had neither been convicted or acquitted.

Had the *indictment* been so improperly drawn, that if the party had been found guilty on all the counts, the court could not have pronounced judgment, the party would not be discharged; but the court would have sent the witnesses before the grand jury again, so that a perfect indictment might have been found. But, inasmuch as the *indictment* was perfect, and such, if the party had been found guilty of the felony charged in it, that the court could have sentenced him to capital punishment, then his life was *once* put in jeopardy; and for as much as the *fifth* amendment to the constitution of the *United*

State vs. Sutton.—1846.

States provides, that no person shall “*be subject for the same offence, to be put twice in jeopardy of life or limb,*” the court are compelled to order his discharge.

The State sued out a writ of error from chancery to this court.

The cause was argued before ARCHER, C. J., DORSEY, CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By RICHARDSON, Att’y Gen’l, for the State, and
By MALCOLM for the defendant in error.

SPENCE, J., delivered the opinion of this court.

The indictment in this case contained two counts:—the first, for a rape; the second, for an assault, with intent to commit a rape. The jury found the prisoner guilty on the second count, namely, of an assault, with intent to commit a rape.

The prisoner’s counsel filed a motion in arrest of judgment, and assigned as the grounds therefor:—First, “because the jury have omitted, in their verdict, to find said *Sutton* guilty, or to acquit him, on the first count of the indictment, by answering to the second count alone, and have thus rendered a defective verdict.”

The second reason assigned in arrest of judgment, is, “that the State has joined distinct offences in the same indictment, and for that reason, they respectfully submit the indictment is bad.” Two issues were submitted to the jury:—the first, guilty, or not guilty, of the rape; the second, guilty, or not guilty, of the assault, with intent to commit a rape.

The jury found the prisoner “guilty of the charge as specified in the second count of the indictment aforesaid, in manner and form as the said State of *Maryland* within against him hath alleged.”

The law seems to be well settled upon authority, that if a jury find but a part of the matters put in issue, and say nothing as to the rest, it is ill. *King vs. Hayes*, 2 *Ld. Raymond*, 1521; and in 1 *Chit. Crim. Law*, 641, it is said: “With respect to the form in which a verdict should be given, which thus partially convicts and acquits, it has been holden, that it ought to

State vs. Sutton.—1846.

find specifically not guilty of the higher, and guilty of the inferior charge; and that if it merely find the defendant guilty of the inferior offence, it will be of no avail."

The same doctrine is held by *Hawkins*, in his pleas of the *Crown B'k*, 2, *ch.* 47, *sec.* 5.

If the law requires all the matters involved in a single issue, to be found by the jury, unquestionably, it requires, where there are two or more issues submitted to the finding of the jury, that they should find upon each, and all, of the issues.

This verdict, therefore, in the language of the books, was ill, and should have been set aside by the court.

The second reason assigned as a ground for arresting the judgment, is settled by the case of *Burke vs. The State*, 2 *H. & J.*, 426, and, therefore, no argument on our part is necessary to maintain the decision of the county court, that a felony and misdemeanor may be joined in the same indictment.

We cannot agree with the county court in the course pursued by them, in arresting the judgment and discharging the prisoner. It cannot be said with correctness, that a verdict, which in legal contemplation is a nullity, could jeopard the life or limb of a party.

In this case, the jury found no verdict on the issue, under the first count in the indictment.

The verdict was imperfect, and the matter in issue not so ascertained, as that the court could render any judgment thereon, and therefore it was a mis-trial. The county court erred in discharging the prisoner; the court should have awarded a *venire de novo*.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Poe, Jr., vs. St. Mary's College.—1846.

GEORGE POE, JR., vs. THE ASSOCIATED PROFESSORS OF
ST. MARY'S COLLEGE, GARNISHEES OF PHILIP McCLOSKEY.—*December 1846.*

By the regulations of a college, the parents or guardians of scholars residing at a distance from the institution, were required to give security for board, tuition, &c.; the parent of a child in lieu thereof, deposited a sum with the agent of the college. HELD: that while the education of the children was in progress, unless the deposit was a fraudulent one, the sum so deposited by the parent could not be attached by his creditor, and the fact that the account, as kept in the books of the college, shewed a balance due the father when the attachment was laid, will not affect the original agreement. The garnishees could not appropriate such special deposit, to the payment of *other claims*, which they might have had against the father. If the specific object of the deposit had terminated, and a balance remained due the debtor, then it might be attached.

APPEAL from *Baltimore county court.*

This was an attachment on warrant, commenced on the 31st January 1843, by the appellant, to recover the amount of several promissory notes of *Philip McCloskey*. The warrant was laid in the hands of the appellees, who pleaded *non assumpsit*, by *Philip*, and *nulla bona*, as to themselves. Interrogatories and answers were filed, but they do not appear to have been used before the jury. The verdict was for the appellee.

At the trial of the cause, the plaintiff proved the promissory notes of the defendant filed with the attachment papers.

The plaintiff then offered in evidence, by *Alexius J. Elder*, that witness has been for many years, and still is, book keeper and agent of the garnishees, and that on the 2nd November 1835, the defendant brought his two sons, *James* and *John*, to the said college, to put them for education; that witness asked him, who was to be the responsible guardian, for the payment of the bills, according to the usual conditions of the college? which conditions the said defendant then had in his hands, in print, and which are as follows:—

“Every student from a distance greater than five hundred miles, must have a responsible guardian in one of the commercial cities of the *United States*, within two hundred miles of

Poe, Jr., vs. St. Mary's College.—1846.

the city of *Baltimore*, who will oblige himself in writing, to make the regular payments; and to receive his ward, in case he should be discharged by the college. Bills are sent at the close of every six months; drafts, at ten days' sight, for the amount, are issued on parents or guardians."

The said defendant then said, "I will stand my own guardian:" and further promised and said, that he would always keep the college in advance. The defendant then left the boys at the college, and that said children are still at said college, under said agreement, and have not yet finished their course. The plaintiff also offered in evidence the account between the defendant and the said garnishees, as stated on the books of the college.

"DR.—*Philip McCloskey, Esq.*, for sons *John* and *James*, in account with *St. Mary's College*.—2nd November 1835. To amount of bills rendered, \$385."

The same items were repeated every six months, until 2nd November 1843. The whole amount of debits being \$7083.96.

The credits were as follows :—

" 1835.—Nov. 2.	By cash,	- - - - -	\$300 00
3.	By cash,	- - - - -	85 00
1836.—June 20.	By cash,	- - - - -	400 00
Nov. 28.	By cash,	- - - - -	500 00
1837.—Aug. 7.	By cash,	- - - - -	500 00
Dec. 22.	By cash,	- - - - -	750 00
1838.—Aug. 4.	By cash,	- - - - -	500 00
Dec. 5.	By cash,	- - - - -	500 00
1839.—Aug. 2.	By cash,	- - - - -	500 00
1840.—Feb. 6.	By cash,	- - - - -	500 00
June 16.	By cash,	- - - - -	500 00
1841.—Jan. 2.	By cash,	- - - - -	500 00
Mar. 24.	By cash,	- - - - -	500 00
June 8.	By cash of <i>Patrick McCloskey</i> , and by him ordered to be placed to the credit of his		

Carried Forw'd, - \$

 Poe, Jr., vs. St. Mary's College.—1846.

	<i>Brought Forw'd,</i>	- \$	
	brother's account, and for		
	his children, and so placed		
	immediately,	- - - -	1240 80
1843.—Jan. 24.	By cash,	- - - -	385 00
June 15.	By cash of <i>Patrick</i> ,	- -	400 00
			<hr/>
			\$8060 80''

The plaintiff also offered in evidence, that the words appended to the entry of the 15th June 1843, were added by the witness about two months after the original entry was made; that the \$1240.80, entered on the 8th of June 1841, and the sum of \$400, entered on the 15th of June 1843, were paid to him by *Patrick McCloskey*, the brother of the defendant; and that when the said *P.* paid the \$400, he told this witness, that it was his, *P.*'s money; and at the time of said last payment of \$400, he, the said *Patrick*, said, that the \$1240.80, was also his money: but that the said *P.* did not say so at the time it was left. That when the said *P.* paid the said sum of \$1240.80, he directed the witness to place it to the credit of his brother *Philip*'s account, and for his children; which was immediately done. The plaintiff also offered in evidence by said witness, that the terms of the said college for boarders, such as the children of said *Philip*, were as follows:

Boarding per annum, \$140; tuition for all the branches comprised in the course, except music, drawing and dancing, per annum, \$60, payable half yearly in advance; washing, &c., are extra expenses.

Upon which, the garnishees prayed the court to instruct the jury, as follows:

1st. If the jury believe, that the funds placed with the college, were there placed as stated in the evidence of *Mr. Elder*, as a fund to pay to the college, for the education of the children of the defendant, and that the education of the children was in progress at the time such deposit was made, and is still going on, and that the bills for such education are now sufficient to exhaust said funds, then the plaintiff cannot recover.

Poe, Jr., vs. St. Mary's College.—1846.

2nd. If the jury believe from the evidence, that the moneys paid by *P. McC.*, to the garnishees, as stated by the witness, were not the moneys of the defendant, *Philip McCloskey*, in this suit, then the plaintiff cannot recover in this suit. To the granting of which said prayers, the plaintiff objected, but the court, (PURVIANCE, A. J.,) overruled said objection, and granted said prayers. The plaintiff excepted.

The plaintiff then prayed the court to instruct the jury :

That if the jury believe from the evidence, that the defendant, *Philip McCloskey*, deposited in the hands of the garnishees in this cause, more funds than were necessary for his said childrens' board and tuition, according to the terms of the institution over which the garnishees presided, up to the time of laying this attachment, and for the half year in advance thereafter; and that at the time of laying said attachment in the hands of said garnishees, and since that time, there has been a surplus in the hands of said garnishees, from said *Philip's* deposits, over and above the amounts required to be deposited by the rules of said college, that the plaintiff is entitled to recover against said garnishees, to the extent of such surplus; which prayer the court refused to grant; the plaintiff excepted.

The judgment being against the plaintiff, he prosecuted the present appeal.

The cause was argued before DORSEY, CHAMBERS, SPENCE, MAGRUDER, and MARTIN, J.

MAGRUDER, J., delivered the opinion of this court.

The judgment of the court below, in this case, must be affirmed.

The plaintiff undertook to attach as the property of his debtor, money in the hands of the agent of the garnishees, placed in his hands to pay the board, education, and other expenses of two young gentlemen, sons of the debtor, while at college. These funds were there, in consequence of an agreement several years previously made, by their father, with the college. The education was in progress at the time of the attachment levied, and was at the time of the trial still going on. Such

Poe, Jr., vs. St. Mary's College,—1846.

was the proof, and the jury were instructed, that if they believed these facts, the plaintiff is not entitled to recover.

It is insisted, that the account for the tuition, board, &c., of these young gentlemen, was kept against the father, and these funds, therefore, were his funds, and answerable for his debts. It does not so appear to this court. Why they were there is distinctly proved, and the case would be the same if the young gentlemen, themselves, had been charged with the bills, and credited from time to time with the different sums of money placed in the hands of the agent of the garnishee, for their use, and to pay their bills.

If the garnishees had had other dealings with the debtor, and the latter had become indebted to them on account thereof, they could not have had a right to deduct from the funds in the hands of their agent, for the use of these scholars, the amount of such claim. If, when this attachment was laid in their hands, they had paid the amount of the plaintiff's claim, still they would have been bound to furnish the scholars with tuition, board, &c., until the fund was exhausted. Money deposited under such an agreement, and for such purposes, cannot be attached as goods, even of the person depositing them, and the garnishees would have been guilty of a breach of trust, if they had appropriated such funds to the payment of debts due from the father in this case, and then have claimed a right to deprive the scholars of the education, &c., which they undertook to give them, in consideration of the payments in advance to them. This would have been the case, even if it had been in proof, that all the moneys which garnishees received, belonged to the debtor in this case. According to the proof, however, a considerable part of this money had been paid by the uncle of the young gentlemen, and the second instruction of the court was, that if the jury believe from the evidence, that the moneys paid by *Patrick McCloskey*, (the uncle,) were not the moneys of *Philip McC.*, (the father and debtor,) then the plaintiff cannot recover. To this instruction, surely, there can be no well founded objection. The money of the former, appropriated as it was by its owner, could not be answerable for the debts of the latter, merely because

Craft vs. Wilcox.—1846.

the person whose duty it was to keep an account of the moneys advanced, and expenses incurred, thought proper to keep that account in the way he did.

It cannot be material, that sometimes the sum in advance exceeded the sum, which, by the rules of the college, was to be paid, where there was a "guardian" who would oblige himself, in writing, to make the regular payments, unless the creditors of the person so advancing, could prove, that the transaction was fraudulent and void, as against them. This was not attempted to be shown.

If such guardian had been procured, the account, in all probability, would have been raised by the college against him, and yet, surely, because of this, his creditors could not have insisted, that the money paid from time to time by him in advance, could have been made answerable for his debts.

This money was paid for a specific purpose, and if the specific purpose was shown to be at an end, and that it had absorbed a certain sum only, and left a "balance," then, indeed, for such balance, the garnishees would be responsible; but to whom, it is not necessary to decide in this case. See the case of *Roberts*, 3rd English Common Law Reports, 132.

JUDGMENT AFFIRMED:

HUGH CRAFT vs. HENRY WILCOX, ET AL.—December 1846.

The act of 1822, ch. 162, which declares, that no deed, &c., shall be construed to create an estate in joint tenancy, unless in such deed, &c., it is expressly provided, that the property thereby conveyed, is to be held in joint tenancy, does not affect a deed to *H and wife*, and their heirs and assigns, forever, and to the survivor of them. Such a deed does not create a joint tenancy.

And if it did, the term survivor in the deed, clearly indicates the intention, that there shall exist a right of survivorship.

APPEAL from the Court of Chancery.

On the 10th January 1842, the appellant filed his bill against the appellees, stating, that the estate of *William Craft* was divided by commission, and a certain portion thereof, to wit,

Craft vs. Wilcox.—1846.

&c., assigned and allotted to *Margaret Ann Craft*, his daughter; that she married *Henry Wilcox*, and had issue, *Margaret Ann Wilcox*; that *Henry and wife*, by deed of 10th November 1836, assigned her interest in fee to *Edwin E. Medford*, who, by deed of 16th November of same year, reconveyed the property to *Wilcox and wife*.

“To have and to hold every part of the said, hereby bargained and sold, lands, unto the said *H. W. and wife*, and their heirs and assigns, forever, and the survivor of them, and to and for no other use,” &c.

The bill then alleged, that under the said deed, *H. W. and wife* did not take as joint tenants, but that they took the property in equal undivided rights, and upon the death of either, the other surviving, an undivided half part of the fee simple, descended to his or her heirs at law; who then held as tenants in common with the surviving party; that the wife of *H. W.* died, leaving an only daughter, *M. A. W.*, who also died a minor and intestate, without children or descendants. The bill then proceeded to show how the complainant, *Hugh Craft*, claimed title as heir to the daughter, *M. A. W.*; and he, with her other heirs, were made parties. The vendees of *H. W.* were also made parties. The bill alleged the interest of the various parties in the whole estate; that it was incapable of division, so as to be of advantage to the parties interested; nor could the same be sold, by reason of the minority of some of the defendants.

Prayer for subpœna, publication, &c. Decree for a sale or division, and for further relief.

Various title papers were exhibited with the bill, and as parcel thereof.

The answers of the infant defendants, taken under commission, admitted the bill.

The adult defendants demurred to the bill, as containing no cause for relief.

On the 6th November 1845, the chancellor, (BLAND,) dismissed the bill with costs, upon the ground, that the deed of the 16th November 1836, conveyed an estate in fee simple to

Craft vs. Wilcox.—1846.

H. W. and wife, which, upon her death, passed by survivorship to him, leaving nothing to descend to her heirs.

From this decree the complainant appealed to this court.

The act of 1822, ch. 162, declares, that “no deed, devise, or other instrument of writing, which may hereafter be executed, shall be construed to create an estate in joint tenancy, unless in such deed, devise, or other instrument of writing, it is expressly provided, that the property conveyed by such deed, devise, &c., is to be held in joint tenancy.”

The cause was argued before ARCHER, C. J., CHAMBERS, SPENCE, MAGRUDER and MARTIN, J.

By C. McLEAN, for the appellant, who contended :

That since the act of 1822, chapter 162, the deed of 16th November did not create a joint tenancy, but a tenancy in common; and that, therefore, the complainant is entitled to the relief prayed.

ARCHER, C. J., delivered the opinion of this court.

The conveyance from *Edwin E. Medford*, to *Henry Wilcox and wife*, and their heirs and assigns, and the survivor of them, is unaffected by the act of Assembly, of 1822, chap. 162: in the first place, because it does not create a joint tenancy, and if it does—secondly, because by the use of the term “*Survivor*,” in the grant, the intention is clearly indicated, that there shall exist a right of survivorship. 2 *Blac. Com.*, 185, *Co. Lit.*, 185*b*.

DECREE AFFIRMED.

INDEX.

ACTION UPON THE CASE.

See COMMON CARRIERS.

PLEAS and PLEADING, 5.

RELEASE, 1, 2.

ACTS OF ASSEMBLY.

1785, ch. 87. Civil Appeals, 301.

1796, ch. 67, sec. 21. Freedom to Negroes, by deed or will, 249.

1798, ch. 101. Executors' Commissions, 72.

1798, ch. 101, s. c. 20, sec. 2 ; s. c. 14, sec. 5, to be construed in connexion, 72.

1816, ch. 154. Infants parties to Sales, 115.

1818, ch. 133. No Repeal of 1816, ch. 115, 154.

1820, ch. 191, sec. 22. Bonds for, and Distribution of Purchase Money, Intestates' Lands, 163.

1821, ch. 252. Unconstitutional, 425.

1822, ch. 162. Joint Tenancy, 504.

1825, ch. 223, sec. 2. Supersedeas, Date of, 48.

1825, ch. 117. Points decided below, 306.

1827, ch. 70, sec. 7. Insolvent Debtor's Schedule, Omission in, 240.

1829, ch. 151. Assignment may be proved not to be in good faith, 213.

1830, ch. 186. Procedendo, after affirmance of Exceptions, 318.

1834, ch. 79. Transfer of Personal Property, 270.

1835, ch. 380. Injunction—Appeal, 463.

1836, ch. 298. *Annapolis and Elkridge Rail Road Co.*, 58.

1837, ch. 253. Notarial Protests of Bills and Notes, 194.

1840, ch. 109. Confirmation of Sales in *Montgomery County*, 333.

1841, ch. 11, sec. 1. Appeals, 38.

1841, ch. 168. *Annapolis and Elkridge Rail Road Co.*, 58.

1841, ch. 262. Divorce, 105.

1843, ch. 188. *Annapolis and Elkridge Rail Road Co.*, 58.

ADMINISTRATOR. *See* EXECUTOR.

ALIMONY *See* DIVORCE.

ANNAPOLIS AND ELK RIDGE RAIL ROAD COMPANY.

See CORPORATIONS, 1 to 6.

APPLICATION OF PAYMENTS.

See COURT OF CHANCERY, 7.

ASSETS. *See* EXECUTOR, 9, 10.

ASSIGNMENT—ASSIGNOR—ASSIGNEE.

1. When the plaintiff claims under an assignment, in virtue of the act of 1829, ch. 51, the defendant may prove, that it was not made *bona fide*. *Crawford vs. Brook*, 213.
2. So when the assignor was examined as a witness, to sustain the right of action of his assignee under that act, the defendant may ask the witness, whether his account had, or had not, been assigned, because of its being barred by limitations, and for the purpose of making himself a witness to prove the rendition of the services charged therein, and the promise of the defendant to pay the same. *Ib.*
3. The defendant may impeach an assignment made for such purposes, on the ground of fraud. *Ib.*
4. When the plaintiff claimed as trustee, in virtue of a purely voluntary assignment, and as assignee, under the act of 1829, ch. 51, and the assignor was offered as a witness to sustain the claim, the defendant may examine into the motives for making the assignment. *Ib.*
5. When such an assignment was made, to enable the assignor to become a witness, and thus remove the bar of limitations, it cannot be regarded as *bona fide* made, within the act of 1829. *Ib.*
6. An account for medical services and the sale of medicine, is a *chose in action* for the payment of money. *Ib.*
7. By the act of 1829, ch. 51, no discrimination is made between express and implied contracts. Both are within the act, when the contract assigned is for the payment of money only.

ASSUMPSIT.

1. The doctrine of *caveat emptor*, does not apply to brokers dealing in bank notes of the other States. Both parties being equally innocent in such a transaction, having equal means of knowledge, and the usage being, that the purchaser may rely upon the skill of the vendor in detecting counterfeits, the former may recover from the latter the sum paid him for such paper, it proving to be forged. *Buck vs. Doyle*, 478.
2. The purchaser may lose his right of recovery by laches. *Ib.*
3. But where the purchaser has parted with such paper, *bona fide*, and for value, and knows nothing of the forgery, he is not guilty of laches, if, on claim being made of him, he refunds his vendee, and thereupon tenders the forged paper to his vendor, and requires him to refund. *Ib.*

See VOLUNTARY PAYMENT.

ATTACHMENT TO COMPEL APPEARANCE.

See PRACTICE, 19, 20.

ATTORNEY AT LAW.

1. The attorney of record in a judgment has no authority to accept a deed of trust for his client. *Doub vs. Barnes et al.*, 1.

See DIVORCE, 5.

EXECUTOR, 3, 4, 5.

AUTREFOIS ACQUIT. See INDICTMENT.

BALTIMORE COUNTY COURT.

See PRACTICE, 30, as to 20th rule thereof.

BANK NOTES.

See ASSUMPSIT, as to recovery for sale of forged paper, innocently.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill of exchange, although accepted, unless drawn on a particular fund, does not operate to invest the payee, with the character of an assignee of such fund. *Wheeler et al., vs. Stone et al.*, 38.
2. In an action by an endorsee against the payee and endorser of a negotiable note, the maker is a competent witness to prove the execution of the note by himself and partners, as makers, and the endorsement by the defendant. *Barry et al., vs. Crowley*, 194.
3. By the act of 1837, ch. 253, the legislature designed, as to the mode of proof of demand, and notice, to place foreign and inland bills upon the same footing; and, as regarded inland bills and notes, to dispense with the necessity of producing oral proof of demand and notice, by substituting therefor the protest of the notary, duly made. *Ib.*
4. In the case of foreign bills, the protest of a notary, duly authenticated by his seal, is received as proof of demand and notice, as therein stated. *Ib.*
5. When a protest, or an authenticated copy thereof, is offered in evidence, it must be received on the footing of the *lex fori*, and the only enquiry is, whether the protest has been duly made? *Ib.*
6. When a protest states, in substance, a demand on the drawer, and notice of non-payment, it is sufficient in point of form. *Ib.*
7. When the court can perceive that a seal is attached thereto, the protest is sufficiently authenticated; neither the seal, nor the signature of the notary, need be proved. *Ib.*
8. Where it was in proof, that the defendant had directed his letters to be sent to *M*, where he had an agent who would deliver letters, there arriving, to him; and it was also in proof, that the defendant received letters at a post office four miles nearer his residence than *M*, he cannot set up, the want of due diligence, in sending his notices of protest to him at *M*. *Ib.*
9. The protest of a promissory note of *W & S*, dated, payable, and protested at the city of *Washington*, which certified, that the notary demanded payment of it from *W*, one of its makers, and was answered, *C* has to pay it, we cannot, and that on the same day he deposited in the post office notice of protest to *C*, (the endorser,) at *M*, states a sufficient demand and notice to bind *C*. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.—Continued.

10. *W, S, D & C.* agreed to sell to *C* all the books, debts, credits, &c., of the firm of *S & W*, and of the firm of *D & S*, estimating the same at \$4526, for ten dollars in cash, and certain outstanding enumerated notes of the two firms, amounting to \$5153.75, and *C* bound himself to pay said notes when due. In an action upon one of said notes of *S & W*, against *C*, the endorser, by the holder thereof, he proved, that he had already obtained judgment against *S*. **HELD**, that this agreement did not render *S* an incompetent witness in the cause, for the plaintiff. If the witness was compelled to pay the note, he could recover upon the agreement against *C*, and by paying the judgment against him, he would not be entitled to an assignment of it, as he was not a security for *C*. *Ib.*
11. The declaration alleged, that a note on which the suit was brought, was made at the county aforesaid, when the note in fact was dated at the city of *W*; this is no variance. *Ib.*
12. The place where a note is dated, is clearly immaterial. *Ib.*
13. *A* gave his promissory note to *J*, who endorsed it to *H*. In an action by *H* against *A*, he pleaded, that after the note was due, and before the commencement of the action, a period of about five months, and before the note was endorsed to *H*, *J* was indebted to him in a large sum, &c., for, &c., which exceeds the amount of the note and the damages sustained by *H*, which he, *A*, offers to set off, and allow to *H* to the full amount of such damages in bar, &c. **HELD**, upon general demurrer, that this plea was no bar to the action. *Annan vs. Houck*, 325.
14. A claim which the maker of a note has against the payee, not connected with it, cannot be set off in an action brought by an endorsee against the maker, though the note was endorsed after it fell due. *Ib.*
15. Any objection which may be taken against a note, may be taken against an endorsee thereof, if, when he took it, it appeared upon the face of it to have been dishonored. *Ib.*
16. A promissory note is certainly negotiable, as well after, as before it became due. *Ib.*
17. In an action upon a promissory note, in the name of the endorsee, *bona fide*, and for valuable consideration, a demand in favor of the maker against the endorser, is not admissible as a set-off, although the note may have been discredited when the endorser took it. *Ib.*

BOND.

1. Upon a bond, reciting, "whereas the above bound *S* and *P* have obtained an injunction to stay proceedings at law, and judgment rendered against them in," &c., with condition to "prosecute the said writ of injunction with effect, and satisfy and pay, as well the judgment as all costs," &c., that shall accrue in the chancery court, or be occasioned by delay of the execution, &c., unless the court of chancery shall decree to the contrary, and shall, in all things, obey such order and decree as the court of chancery shall make in the

BOND.—Continued.

premises, the obligors cannot plead in bar, that the parties did not obtain any injunction from the court of chancery. *Lloyd vs. Burgess*, 187.

CASES EXPLAINED OR OVERRULED.

1. The reasons assigned by the court in 5 *Binney*, 198, for the admission in evidence of the declarations of a party who purchased goods, under a guaranty to charge his guarantor, are not satisfactory to this court. *Griffith vs. Turner*, 111.
2. The rejection of such admissions, is placed on the true legal ground in the case of 5 *Esp.*, 27. *Ib.*
3. The confession of a judgment, was received in evidence in the case of 12 *Wheat.*, 515, on the ground of the peculiar form of the guaranty which made the guarantor answerable for the conduct and all the engagements of his son. *Ib.*
4. The case of *Ridgely vs. Iglehart*, 6 *Gill & Johns.*, 49, as to the construction of the act of 1820, chap. 191, sec. 22, explained. *Thomson vs. State, use of Adm'r of Ford*, 163.

As to *MURPHY vs. CORD*, 12 *Gill & John.*, 182. See *DOUB vs. BARNES*, et al., ante, 1. *WEST vs. HYLAND*, 3 *H. & J.*, 200. See *HARDEN vs. CAMPBELL*, 29.

CASE STATED.

See *PRACTICE IN COURT OF APPEALS*, 5.

CAVEAT EMPTOR.

See *ASSUMPSIT.*

PURCHASER.

COLLECTORS OF COUNTY LEVIES AND TAXES.

1. It is not necessary for a collector of taxes to show, that he has paid off the whole county levy, before he can maintain an action on the bond of one of his deputy collectors for a part of such levy. *Post and Fitzhugh, vs. Sheppard*, 276.
2. The bond of a deputy collector is not a mere bond of indemnity, given for the protection of the county collector. *Ib.*
3. Deputy collectors have nothing to do with the ultimate payment over of moneys levied for county or State purposes, nor with the disposition which their principals may make thereof. *Ib.*
4. The general design of our collection system is, that the taxes shall be collected within the time prescribed by law, and then paid over by the county collectors, they having first received them from their deputies. *Ib.*

COMMISSIONS TO EXECUTORS.

See *EXECUTORS.*

COMMON CARRIERS.

1. It is the duty of a stage owner, in the transportation of passengers, to have drivers of competent skill, who should use such skill with diligence, and the utmost caution and prudence; they must be well acquainted with the road they are bound to travel, furnished with

COMMON CARRIERS.—*Continued.*

- well broken, safe, and steady horses; coaches and harness of sufficient strength, and properly made: the least failure in any one of those particulars, subjects the stage owner to the imputation of negligence, and makes him responsible for the injury or damage arising from such failure. *Stockton vs. Frey*, 406.
2. In an action to recover damages for a personal injury done the plaintiff, by the negligent driving and upsetting of a stage coach, the jury, in estimating his damages, are to consider, what, before the injury complained of, was the health, and physical, and mental ability of the plaintiff to maintain his family, as compared with his condition in those particulars, after and up to the institution of the suit, in consequence of the injury complained of, and how far it is permanent in its results, as well as the physical and mental suffering he has sustained by such injury, and should allow such damages as, in their opinion, will fairly compensate the plaintiff for the loss and injury which they may find he has so sustained. *Ib.*
 3. To entitle the plaintiff to recover against the owner of a stage coach, for injuries sustained by him in his person, the jury must find, that the injury to the plaintiff was occasioned by the negligence of the defendant, his servants or agents. *Ib.*
 4. The fact of the overturning of a coach, is *prima facie* evidence of negligence; yet, if it was an accident against which human care and foresight could not guard, and was not the result of negligence in any degree, then the plaintiff is not entitled to recover. *Ib.*
 5. The law makes proprietors of stage coaches responsible for carelessness and negligence—want of due care—in the conveyance of passengers; but not, at all events, as in the case of common carriers. *Ib.*

COMPULSORY PAYMENT. *See* VOLUNTARY PAYMENT.

CONSTRUCTION OF ACTS AND STATUTES.

1. Courts will give a liberal construction to beneficial and remedial laws, but still it is the business of courts to declare, not make the law. So improvements in the law are to be accomplished by further legislation, not by misconstruction. *Annan vs. Houck*, 325.

See JOINT TENANCY, 1, 2.

CONSTITUTIONAL LAW.

1. By the act of 1821, chap. 252, for the more perfect security of the basin and harbor of *Baltimore*, the corporation of that city were empowered, whenever it might deem the same necessary, to compel individuals, companies, or bodies politic, owning property binding on *Jones Falls*, within the limits of the city, to wall up the same, on the refusal or neglect of any proprietor thereof to make such wall, after three months' notice from the commissioners of the city, which they were authorized to give: **HELD**, by the county court, and affirmed by a division of this court, that the act, in question, was unconstitutional and void. *Mayor &c., of Baltimore vs. Lefferman*, 245.

See CORPORATIONS 1 to 6.

CONTRACT.

1. *T* addressed a letter to *G*, informing him that *E* and *P* were about to embark in business together, and stating, "should they make a bill with you, I will be responsible for the amount." HELD, that the engagement on the part of *T*, was to be responsible for such bill as *E* and *P* should make, and not such bill as they should acknowledge they had made. *Griffith vs. Turner*, 111.
2. In an action to enforce the above guaranty, *P* had a right to have the delivery of the goods proved in the accustomed mode, and not by hearsay evidence. *E* and *P* were witnesses, and could have been examined to establish such delivery to them. *Ib.*
3. A claim for services rendered—surrendered by one party to another, at the time of an agreement made in relation to a sale of slaves,—is just as available to pass title, as if money had been paid. *Mudd vs. Turton*, 233.
4. *M* agreed with *B* and *H*, to sell them lands in *Maryland*, in consideration of which they agreed to deliver to him conveyances which they held, for certain lands in *Illinois*. The contract contained no covenant nor warranty of title. The case, in fact, was clear of fraud or misrepresentation, and the bill did not allege mistake. The purchasers of the *Maryland* property were let into possession. The conveyances of the *Illinois* land to *M*, were delivered. *M*, finding he could not recover possession under them, filed his bill to cancel his agreement with *B* and *H*; and to be restored to his original possession. HELD, that a mistake as to title, in which both parties participated, and by which both might be injured, in the absence of warranty, fraudulent misrepresentation, or concealment, would not entitle the complainant to have the contract vacated. *Middlekauff vs. Barrick et al.*, 290.
5. The doctrine of *caveat emptor*, does not apply to brokers dealing in bank notes of the other States. Both parties being equally innocent in such a transaction, having equal means of knowledge, and the usage being, that the purchaser may rely upon the skill of the vendor in detecting counterfeits, the former may recover from the latter the sum paid him for such paper, it proving to be forged. *Buck vs. Doyle*, 478.
6. The purchaser may lose his right of recovery by laches. *Ib.*
7. But where the purchaser has parted with such paper, *bona fide*, and for value, and knows nothing of the forgery, he is not guilty of laches, if, on claim being made of him, he refunds his vendee, and thereupon tenders the forged paper to his vendor, and requires him to refund. *Ib.*
8. All the covenants and agreements of a *feme covert*, (except in regard to separate property,) are null and void at law and in equity. She cannot be compelled to perform them, whether entered into by herself, or, on her behalf, by her husband, with or without her consent. *Burton et al., vs. Marshall*, 487.

9. To restrain a married woman by injunction upon the footing of her contract, as if she were single, would, by indirect means, be an abuse of the process of the court. *Ib.*

See EVIDENCE, 18, 19.

INFANCY—INFANT.

CONTRIBUTION.

1. Where two parties are equally bound by separate instruments, under seal, as securities, for the payment of the same debt, and a payment by one redounds to the discharge of the other, the one, making the payment, may recover by way of contribution, either at law, or in equity. *Craig and Angle vs. Ankeney*, 225.
2. Parties equally bound as sureties by different instruments for the same debt, may still be liable to each other for contribution. The doctrine of contribution is not founded on contract, but upon an implied equity resting upon natural justice, and sound morality. *Ib.*
3. Where parties are so bound, it would be against equity to permit one to recover from the other, more than a moiety of the amount paid by him, in satisfaction of a debt, for the payment of which both are equally responsible. *Ib.*

See SCIRE FACIAS, 2.

CONVEYANCES. See DEED.

CORPORATIONS.

1. By the act of 1841, chap. 168, the *Annapolis & Elkridge Railroad Co.* were authorised to issue bonds, to an amount not exceeding, &c., in the names of the creditors of that company, as payees. A special fund was designated in the act for the payment of interest, the principal being irredeemable for thirty years. Another section of the act referred the claims of *P.* to the arbitrament of *L.*, and any amount so found due him, should be paid in like manner as the claims of other creditors, "and not otherwise." HELD: that the creditors for whom provision is made, as aforesaid, were to be creditors of the company at that time; and the fund thereby created, is for the payment of those claims, and none others. All the, then, creditors have an interest in it; and of which they could not be deprived by the board of directors of the company, without their consent. *McCullough vs. Annapolis and Elkridge Rail Road Co.*, 58.
2. To entitle *P* to an interest in this fund, he must submit his claim to the award of *L*, which is conclusive, and so of his assigns. The proof of such submission is upon him, and the directors of the company could not authorise their president to issue a bond to the assignee of *P*, payable out of the fund created by that act, unless *P's* claim had been first ascertained by *L*. *Ib.*
3. And where the legislature, by a subsequent act, (1843, chap. 188,) submitted the claim of *P* to other arbitrators, to proceed *de novo*, disregarding the act of 1841, and directed the company to issue the bonds mentioned in the *first* act, to such additional amount as would be sufficient to pay the *second* award. It was further held, that the creditors of the company, or such of them as had agreed to the

CORPORATIONS.—*Continued.*

- law of 1841, and their claims ascertained by the company, have an interest in the fund, and without their consent, no part of it could be applied to the payment of any debt for which the act of 1841 did not provide. *Ib.*
4. Until creditors to whom bonds were issued under the act of 1841, are satisfied, the fund provided by that act belongs to them, and cannot be taken from them. *Ib.*
 5. Under the charter of the *Annapolis and Elkridge Railroad Company*, (1836, chap. 298,) many of the provisions of which are borrowed from that of the *Baltimore & Ohio Railroad Company*, the directors thereof cannot, by resolution or by-law, deny either to the president of the company or the directors appointed by the State, the same right to vote upon the various questions to be decided by the president and directors, as those who are elected by the stockholders possess. *Ib.*
 6. The president of that company, therefore, cannot by resolution have his right to vote restrained to the mere right of giving a casting vote in case of a tie. *Ib.*
 7. The charter of a religious corporation required, that at all meetings of the elders and trustees, the minister, for the time being, should be president of the vestry ; that the male members should meet on the 1st Monday of, &c., or within ten days thereafter, to elect elders and trustees, at their church, &c. Notice to be given by the president on the Sunday preceding the day of that meeting, to elect from members, by ballot, four elders for one year, and until another election should be made; and also to elect four other members, as trustees. When elders and trustees were to be appointed, those for the time being, should, at least eight days before the election, nominate double the number of those, so to be elected. The property of the corporation was vested in the elders and trustees. In 1842, a difference arising in the congregation, at January 1843, two sets of officers were elected : one set adhering to the minister and president, were elected with his nomination. The other, appointing afterwards, in 1843, another minister and president, had also kept up a succession ever since. The election in 1842 was admitted to be valid. **HELD:** that even if the election in 1843 be invalid, still, as those elections which occurred afterwards, from 1844 to 1847, were made upon the notice of the minister and president, duly given, the irregularity of 1843 could not be relied upon, to impeach their validity ; nor could those elders and trustees, who were petitioners, and elected without the notice required by the charter, claim the interference of the court, by *Mandamus*. *Smith, et al., vs. Erb, et al.*, 437.
 8. To constitute a valid election, notice should be given by the president of the vestry, in conformity to the charter. *Ib.*
 9. Where an election for officers of a corporation is had, and officers *de facto* are elected, and act, they are presumed to pursue the legal preparatory measures for an election for the next year ; which when had, makes the successors officers *de jure*. *Ib.*

See **MANDAMUS**.

COURT OF CHANCERY.

1. If judgment creditors assent to a deed of trust made by their debtors, assigning real and personal property for their payment, according to their legal priorities; and by their conduct induce third parties to purchase such estate then bound by their judgments, and to believe that they would look to the trustees, and not to their liens, for payment of their claims, such conduct would furnish the purchasers a valid equitable defence, against the enforcement of the judgment liens by a re-sale, under execution. *Doub vs. Barnes, et al.*, 1.
2. It would be a fraud on the purchasers, after such conduct, to permit the creditors to enforce their judgments against such purchasers. *Ib.*
3. In such a case, it would not be necessary for the purchasers to see to the application of the purchase money. *Ib.*
4. Such a defence, however, could only be available on the ground of fraud; it could not be relied upon as a payment, surrender, or release, nor pleadable as such in a court of law. *Ib.*
5. Where the character of a defence is not such as that thereby a judgment will be vacated, but equity would prevent its enforcement in relation to certain property of the debtor, it would not constitute a defence at law. *Ib.*
6. Where the defendant in a judgment assigns property for its payment to trustees, one of whom was the attorney of record of the plaintiff, the fact that the plaintiff had suspended execution on his judgment, while he never acquiesced in the deed of trust, will not prevent to enforcement of his judgment at law against land on which his judgment was a lien, though sold by said trustees. *Ib.*
7. Where defendants at law assigned their lands to trustees for sale, to pay judgments according to their priorities, and they made sales, a purchaser who had not looked to the application of his purchase money, cannot, as against a judgment creditor who had not consented to the deed of trust, nor in any way acquiesced in it, require such creditor to proceed, *first*, against the land remaining unsold by the trustees, and *next*, against the land sold by the trustees after the sale made to such purchaser, in the reverse order of such sales. *Ib.*
8. *H* devised an estate in land to his wife and daughters, for life, with remainder in fee to his son *S*; and in the next clause of his will, gave to his son *J* a sum of money, to be paid to him by *S* in five annual instalments, "the first payment to be made at the end of the first year after he gets possession of the plantation." The devisees for life having died, some of the heirs at law of *S*, and the heirs of *J*, filed a bill, praying a sale of the land, and the proceeds thereof to be distributed among the parties severally entitled thereto. **Held**: that the legacy when due, was payable to the executors, or administrators, of *J*, and the bill must be filed by them. *Hanson vs. Hanson*, 69.
9. The bill could not be filed until the first payment was due, viz., the end of the first year after the devisee in fee got possession. *Ib.*

COURT OF CHANCERY.—*Continued.*

10. It would be no defence to such a bill to object, that before a sale can be made, the estate should be divided among the heirs of the deviser; or if incapable of division, that the heir entitled should have a right to elect. *Ib.*
11. *S*, the creditor of *C*, obtained a decree for the sale of real and personal estate, mortgaged by the latter to him; and at the sale thereof became the purchaser. After the sale, *C* agreed to repurchase the property, and applied to *H* to advance him certain bank stock and bonds, on account of which *S* conveyed to *H* four hundred acres of the estate in question, agreeing to receive the stock and bonds as cash; and that the balance of the mortgaged estate should remain subject to a lien, to *H*, for the sum due him beyond \$10,000, the value of four hundred acres of land conveyed to *H*. The debt due from *C* to *S*, was ascertained to be less than *S* originally claimed. Some years afterwards, *S* sold and conveyed his interest in the estate to *J*, for the sum of \$7265.65. By the indenture between *S* and *J*, it was covenanted, that *J*, by his indenture of mortgage upon the said estate, would secure to *S* the payment of one of the afore-said bonds; and also secure him from the claim of *H* thereon, and which claim was not to be altered or prejudiced by the sale from *S* to *J*; and that *J* was to stand in the place of *S*. Upon a bill filed by the representatives of *H* to enforce his lien, it was decreed, that unless *J* should pay the balance due to *H*, on or before, &c., then the estate should be sold, and out of the proceeds thereof, after payment of the debt of *S* assigned to *J*, the complainant should be paid. The decree also directed an account of rents and profits, &c., to be taken, and after allowing *J* for all just and necessary improvements made by him upon the the said estate after he came into possession, the balance should be applied to the payment of *J*'s claim, as assignee of *S*. *Jones, adm'r of Hawkins, et al., vs. Jones*, 88.
12. The interest conveyed by *S* to *J*, in equitable contemplation, was but a lien upon the premises for the balance due by *C* to *S*. *Ib.*
13. When a defendant purchased in ignorance of any defect of title, though apprized of the claim of the complainant for a lien on the premises purchased, and took possession and made improvements under the opinion of counsel that the title was clear; and all his acts and the circumstances of the case demonstrate, that at the time of his purchase, and when the improvements were made, he believed his title to be a good one, he is entitled to compensation, as a *bona fide* possessor, for the amount of his melioration and improvements of the estate, beneficial to the true owner. *Ib.*
14. Where a complainant has no absolute unqualified right to the interposition of a court of chancery—is only entitled to relief in the sound discretion of the court, which may be modified, made conditional, or wholly denied, as may be consistent with the dictates of equity and conscience, as when he seeks to enforce the specific execution of a contract—the defendant in possession will be allowed for such im-

COURT OF CHANCERY.—*Continued.*

- provements, made *bona fide*, without a knowledge of the defect of his title, as have permanently enhanced the value of the lands, and to the extent of such enhanced value, the plaintiff is bound in conscience to make compensation, *ex æquo et bono*. *Ib.*
15. Where a petition showed an appropriate case for the jurisdiction of the county court, no errors or irregularities in the proceedings under it, can oust the court of the jurisdiction thus acquired, or impair, as to those who are parties and privies, the validity of its decree, when collaterally drawn in question. *Hunter vs. Hatton and Kendrick*, 115.
 16. But where, after a decree for a sale, and a sale in fact, the infant, whose lands were affected, united with her husband in a petition in the cause, and made themselves parties thereto, and ratified what had been done, and called upon the court to enforce the sale, or re-sell the property. After ratification of the sale, and payment of the purchase money to the trustee, and conveyance of the land by the trustee to the purchaser, the husband of the infant will not be permitted to insist, that the proceedings are null and void, because of the non-summons of his wife. *Ib.*
 17. The testatrix, by her will, in 1828, directed her executors to manumit, by deed, all her slaves, whose age and health might be such as their manumission may not be prohibited by law, leaving it in the discretion of the executors to carry such direction into effect, at such time or times as they may judge proper and expedient. Several of her executors renounced the trust, but one of them accepted it. After a lapse of fourteen years, a number of the slaves filed their bill against all the persons alive, named as executors, including the one who took out letters, in which they alleged, that the executors refused to execute to them deeds of manumission, although not prohibited by law, and retained them in servitude for their own profit; that the testatrix left sufficient personal estate to pay her debts, without including the complainants, and no debts unsatisfied. To this bill the defendants demurred. HELD, that the facts disclosed, presented a proper case for the interposition of a court of equity, on the general principles by which that tribunal is governed in the execution of trusts and powers. *Peters, et al., vs. Van Lear*, 249.
 18. Equity has no power to determine, by decree, the right to freedom, nor to order an account of the value of the services of the complainants while detained as slaves. *Ib.*
 19. The real estate of a deceased debtor is not primarily liable for the payment of his debts; for that purpose, it is but an auxiliary to the personal fund, and is only answerable to creditors to the extent of the deficiency of the latter. *Warfield et al., vs. Owens*, 364.
 20. The rents and profits of the real estate of a deceased debtor, whose personal estate is insufficient for the payment of his debts, and which accrued before a sale under a decree, at the suit of his creditors, is responsible in equity for their payment. *Ib.*
 21. The heirs of the deceased debtor, or any other person receiving the same after his death, and before a sale, will, in equity, be considered as receiving the same for the benefit of such creditors. *Ib.*

COURT OF CHANCERY.—*Continued.*

22. Upon a proper bill filed for the recovery of such rents and profits, the receivers thereof will be made to account with the creditors of the deceased. *Ib.*
23. This accountability results from a clear principle of equity jurisdiction, that where the right is clear, and the law can give no adequate remedy, a court of chancery will relieve. *Ib.*
24. Where the accountability for rents and profits is established, a court of equity may, in a proper case, appoint a receiver thereof, or impose upon the tenant of the estate an occupation rent. *Ib.*
25. But where a bill seeks no relief out of rents or profits, and merely calls for a sale of the realty, in aid of the personalty, the latter being alleged to be insufficient, and the defendants deny the existence of the debt on which the bill proceeds, the insufficiency of the personalty, and plead limitations, and the proof taken did not establish such insufficiency, the complainants cannot ask either for an injunction to restrain unskilful cultivation, the appointment of a receiver, or an occupation rent. *Ib.*
26. To entitle a creditor, seeking to sell real estate for the payment of debts, to an order for injunction to restrain wasteful or unskilful cultivation, the appointment of a receiver of the rents and profits, before decree, or payment of an occupation rent, as against the widow and infant heirs of the deceased debtor, he must show, that it was necessary for his protection from loss, or that he had a right to demand it, because of the certainty or strong probability, that the real and personal estate of the deceased, would be insufficient for the payment of all the creditors of the deceased. *Ib.*
27. Fear and belief, unsustained by facts establishing their probability, or showing them to be well founded, are not a sufficient foundation for the interposition of a court of equity, by way of injunction, or for the imposition of an occupation rent. *Ib.*
28. Difficulties to be encountered in stating accounts, are no grounds why accounts ought not to be decreed, where the court perceives they are necessary to the rights of the parties, and ends of justice. *Bevans vs. Sullivan, et al., 383.*
29. Every reasonable presumption will be made against those partners, whose fault it is that the books of accounts of a partnership are imperfectly kept; and if they claim to be entitled to other credits than those to which the books, at the close of the partnership, entitle them, it is usual to require of them very strict proof. *Ib.*
30. Circumstances stated, under which a court of equity will infer the existence of a partnership, in opposition to an answer denying it. *Ib.*
31. Where a bill alleged a partnership to have commenced and terminated at a particular day, and the proof established its commencement, a partner who insists that it was dissolved at an earlier period than that alleged, will have to prove it. *Ib.*
32. For personal services rendered by a partner, no compensation can be claimed, without proof of an express agreement, that he should be compensated for them. *Ib.*

COURT OF CHANCERY.—*Continued.*

33. In June 1783, the owner in fee of a square of ground in the city of *Baltimore*, conveyed it to trustees to erect a *R. C.* church, and lay out a place of burial on the same, for the use of the *R. C.* of the said city. The deed declared, that if the trustees did not build, erect and complete the said church, and appropriate the residue of the square in laying out a burial ground for the use of the said persons, then it should be void, and the reversion in the grantors. No church was erected on the lot; but a church was erected by the same society of christians, upon a lot in the neighborhood, and the square conveyed, was used exclusively as a place of sepulture. The corporation of *Baltimore* paved the streets adjacent to the square; claimed the cost thereof as a paving tax, and to sell the square, in consequence of its non payment for their reimbursement, or that of the persons who had paved the streets. Upon a bill filed by the pastor of the church actually built, and by one of its congregation, who, with others of that church, and its persuasion, had used the square as a place of burial from 1783, hitherto, for an injunction to restrain the proposed sale for taxes. HELD, that neither of the complainants had any interest, legal or equitable, for the protection of which they could claim the interposition of a court of equity. *Dolan and Foy, vs. M. & C. C. of Balt.*, 394.
34. If the conditions of the deed have not been performed, the whole estate, legal and equitable, will have reverted to the heirs of the grantor, unless the heirs of the surviving trustee can allege and prove, in a court of equity, such positive agreement on the part of the grantor, or his heirs, or such specific acts of the parties, with distinct knowledge of the grantor, or his heirs, amounting to evidence of such an agreement as would entitle the claimants, by a bill for specific execution of such agreement, to a deed of conveyance, discharged of the condition so violated. *Ib.*
35. Specific performance of a contract, is not a matter of right in the parties, but depends upon the sound and reasonable discretion of the court; is granted or withheld according to the circumstances of the case; and the court must be satisfied, that the contract sought to be enforced is fair, just, and reasonable, equal in all its parts, and founded on an adequate consideration. *Geiger vs. Green*, 472.
36. A court of chancery never lends its aid in furtherance of injustice and oppression. *Burton, et al., vs. Marshall*, 487.
37. While a complainant is prosecuting a suit at law, to recover damages for the violation of a contract, it is both unjust and oppressive, at the same time and for the same injury, to seek to visit the defendant, in a court of equity, with the pains and penalties of injunction, by which he might be stripped of all means of subsistence, or violating the injunction, be imprisoned for contempt. *Ib.*
38. Equity will not listen to a complainant who thus presents himself for relief, until he makes his election in which court he desires to proceed in pursuit of his rights, and has dismissed, or agreed to dismiss, his proceedings in the other. *Ib.*

COURT OF CHANCERY.—*Continued.**See* CONTRIBUTION.

DEEDS, as to deeds of preference, 1.

DIVORCE.

IMPROVEMENTS.

INFANCY.

INJUNCTION.

PRACTICE IN EQUITY.

CRIMES, *See* INDICTMENT.

DAMAGES.

1. A party is entitled to recover but one compensation for an injury received. *Burton, et al., vs. Marshall*, 487.

See COMMON CARRIERS, for measure of, for personal injury.

RELEASE, as to unliquidated damages.

DEBTOR AND CREDITOR.

See DEEDS, 1.

DEED.

1. A deed from the several partners of a firm in failing circumstances, for a nominal consideration, conveyed all their effects to trustees in trust :
 - 1st. To take possession of and recover such estate; give acquittances, and compound and arbitrate all debts assigned; appoint agents and substitutes, and sell the estate recovered.
 - 2nd. To pay and discharge the expenses of the trust.
 - 3rd. To pay and satisfy a certain judgment mentioned in the deed against one of the partners, for a debt due by the firm in *New York*.
 - 4th. To pay and satisfy all the small debts of the firm, under the sum of one hundred dollars.
 - 5th. To pay the whole of the residue of the estate recovered, or so much thereof as might be necessary, to and amongst such of the creditors of the firm as should, within ninety days of the date of the deed, signify their assent to the terms thereof, and execute and deliver to the grantors a full and final release and discharge of and from all claims, in manner following, to wit : 25 per cent. on account of merchandize purchased ; then 25 per cent. on account of borrowed money and accommodation paper, and other confidential engagements of the firm ; then the balance, principal and interest, of the releasing creditor's claims.
 - 6th. If the funds prove more than sufficient for the above objects, the residue to be paid to the grantors. *McCall, et al., vs. Hinkley and Woodward*, 128.
2. Upon the prayer that the said deed is void in law, in that it gives an undue preference to one class of creditors, and requires all creditors who may partake of its benefits, to execute a general release to the grantor's debtors. The county court declared the deed to be valid ; upon appeal, affirmed by a divided court. *Ib.*

DEED.—Continued.

3. A party is estopped from denying a fact recited in his deed. *Lloyd vs. Burgess*, 187.
4. The act of 1822, ch. 162, which declares, that no deed, &c., shall be construed to create an estate in joint tenancy, unless in such deed, &c., it is expressly provided, that the property thereby conveyed, is to be held in joint tenancy, does not affect a deed to *H and wife*, and their heirs and assigns, forever, and to the survivor of them. Such a deed does not create a joint tenancy. *Craft vs. Wilcox*, 504.
5. And if it did, the term survivor in the deed, clearly indicates the intention, that there shall exist a right of survivorship. *Ib.*

See COURT OF CHANCERY, 34, 35.

Relation of Trustee's deed to time of judicial sale, see TRESPASS, 1 to 4.

DELIVERY OF PERSONAL PROPERTY.

See PERSONAL PROPERTY.

DEPUTY COLLECTORS OF COUNTY LEVIES AND TAXES.

See COLLECTORS OF COUNTY LEVIES AND TAXES.

PLEAS AND PLEADING, 4.

DIVORCE.

1. Under the act of 1841, chap. 262, divorcees *a mensa et thoro*, may be decreed in equity for cruelty of treatment—or excessively vicious conduct, abandonment, and desertion. *Ricketts vs. Ricketts*, 105.
2. In a case of great cruelty, harsh usage, for a series of years, practised by the husband towards his wife, such a divorce will be decreed. *Ib.*
3. Where the income of the husband may be fairly estimated at nine hundred dollars per annum, alimony out of that income of one-third of its amount, for the maintenance of an aged wife, who has been compelled to abandon her home by his cruelty, is not unreasonable. *Ib.*
4. The amount of alimony must depend on the circumstances of each case. *Ib.*
5. The court has power to compel the husband to pay a proper fee for retaining counsel, to aid the wife in the prosecution of the bill against him, for divorce and alimony. *Ib.*
6. Upon a bill filed for divorce and alimony, the defendant, the husband, having been summoned, and not appearing in the cause, proof being taken of his title to various items of leasehold property, upon petition of the wife, alleging, she was advised by her counsel, that it was in the power of her husband to alien the same, and the proceeds to secrete pending her bill, and so make null and void, to all practical purposes, any order for her maintenance, the court awarded an injunction, prohibiting him from alienating any part of the landed property or chattels in this State, of which she had given evidence. *Ib.*
7. Where the county court, by an interlocutory order, *pendente lite*, ordered the husband to pay a sum for her maintenance during the progress of the cause, it is error at the passage of the final decree to increase that allowance, by ordering a further sum in gross to be paid. *Ib.*

ELECTION OF ACTIONS AND MODE OF PROCEDURE.

1. A court of chancery never lends its aid in furtherance of injustice and oppression. *Burton, et al., vs. Marshall*. 487.
2. While a complainant is prosecuting a suit at law, to recover damages for the violation of a contract, it is both unjust and oppressive, at the same time and for the same injury, to seek to visit the defendant in a court of equity, with the pains and penalties of injunction, by which he might be stripped of all means of subsistence, or violating the injunction, be imprisoned for contempt. *Ib.*
3. Equity will not listen to a complainant who thus presents himself for relief, until he makes his election in which court he desires to proceed in pursuit of his right, and has dismissed, or agreed to dismiss, his proceedings in the other. *Ib.*
4. A party is entitled to recover but one compensation for an injury received. *Ib.*

EQUITABLE ASSIGNMENTS.

Under Act of 1829, see ASSIGNMENT.

ESCAPE.

1. The case of *West's executor, vs. Hyland*, 3 *Harris & Johnson*, 200, is imperfectly reported. In that case, the sheriff did not bring the body of the defendant into court on the return of the first *ca. sa.*, and the defendant, after its service, escaped from the custody of the sheriff, before the second *ca. sa.* was issued. *Harden vs. Campbell*, 29.
2. An escape from the sheriff, without the consent of the creditor, does not prejudice him or extinguish his judgment. *Ib.*

ESTOPPEL. See BOND, 1.

EVIDENCE.

1. Under what circumstances will the quarrying of stone be considered an irreparable injury to the inheritance. *qr. Hamilton, et al., vs. Ely, et al.*, 34.
2. The counsel fee paid by a caveator of a will admitted to probate, is evidence of the reasonableness of a similar fee allowed to the executor, for the caveatee's counsel, to maintain it. *Compton vs. Barnes*, 55.
3. An exhibit which consisted of mere pencil marks upon an isolated paper, unexplained by any testimony to show the time or occasion which gave birth to it, as testimony, is of too questionable a character to be made the basis on which the rights of the parties litigant in the cause, should be adjusted. *Jones, Adm. of Hawkins et al., vs. Jones*, 87.
4. Where the testimony of several witnesses in regard to the amount of rent which ought to be paid, was of such a nature as to require it to be averaged, the aggregate amount ought to be ascertained by adding together the estimate of each and every witness who testified thereto, and dividing the sum thus obtained by the *entire* number of witnesses. Concurring witnesses will each be counted as one. *Ib.*
5. The rule of averaging the testimony of witnesses, necessarily excludes, and is apart from all corrupt concert between the witnesses. *Ib.*

EVIDENCE.—*Continued.*

6. *T* addressed a letter to *G*, informing him that *E* and *P* were about to embark in business together, and stating, "should they make a bill with you, I will be responsible for the amount;" HELD, that the engagement on the part of *T*, was to be responsible for such bill as *E* and *P* should make, and not such bill as they should acknowledge they had made. In an action to enforce the above guaranty, *P* had a right to have the delivery of the goods proved in the accustomed mode, and not by hearsay evidence. *E* and *P* were witnesses, and could have been examined to establish such delivery to them. *Griffith vs. Turner*, 111.
7. If *E* and *P* could be considered as agents, their declarations, *ex post facto*, in relation to the purchase, would not be admissible evidence to charge *T*. *Ib.*
8. In the presence of *T*, one of the firm of *E* and *P*, admitted the amount of their purchase from *G*, and that subsequent to said conversation, *T* called, in company with *E*, and expressed a wish that the same might be paid. HELD, that if *T* had knowledge of the facts admitted by *E*, and heard the admission, without observation, he might be considered by the jury as acquiescing, by his silence, in the verity of such admission. *Ib.*
9. Whether he had such knowledge, was a question of fact for the jury. *Ib.*
10. The reasons assigned by the court in 5 *Binney*, 198, for the admission in evidence of the declarations of a party who purchased goods, under a guaranty to charge his guarantor, are not satisfactory to this court. *Ib.*
11. The rejection of such admissions, is placed on the true legal ground in the case of 5 *Esp.*, 27. *Ib.*
12. The confession of a judgment, was received in evidence in the case of 12 *Wheat.*, 515, on the ground of the peculiar form of the guaranty, which made the guarantor answerable for the conduct and all the engagements of his son. *Ib.*
13. Irregularities and errors which occur in the progress of an equity suit, which could only be taken advantage of by the party aggrieved by them, on a rehearing, a bill of review, or on appeal in the cause in which they are found, detract nothing from the validity of the decree, when the record of such cause is presented as evidence collaterally. *Hunter vs. Hatton and Kendrick*, 115.
14. Such is the nature of the irregularity in appointing commissioners, to determine whether an infant's land ought to be sold for her advantage, before her petition for sale was filed with the clerk; of the exercise of the authority by the commissioners, without the issuing of a commission to them; that the commissioners were not freeholders, or the substitution of one purchaser for another at the time of final ratification of the sale. *Ib.*
15. Where a petition was filed by an alleged guardian and *prochein ami* of an infant, for a sale of her land, on the ground that it would be

EVIDENCE.—*Continued.*

for her interest and advantage, to which she was not summoned nor made a party, the objection that the record of such a cause is not evidence against her, is not one to the jurisdiction of the court, but rests on the broad principle, that decrees and judgments are only binding on parties to the proceedings on which they are founded, and those claiming under them. *Ib.*

16. Where, under the issue joined, the only question was, whether the plaintiff had a freehold estate, parol evidence that the defendant had received from the plaintiff a balance of purchase money, for the land in controversy, and that thereupon the plaintiff had taken possession, with the consent of the defendant, who said he renounced all his claim to the land, has no tendency to prove or disprove the fact at issue. *Ib.*
17. Where the plaintiff sued out a writ as administratrix, and declared as executrix in assumpsit, under the general issue plea she may offer in evidence her letters testamentary, to show the character in which she sues. *Chapman's adm'r, vs. Davis, exc'x*, 366.
18. Where *C* and *D* entered into a single bill, of which each paid one-half, in an action by the executrix of *D* against the administratrix of *G*, on the ground that *C* was the principal debtor, and *D* only the surety, and for the purpose of recovering the whole debt from *C*'s estate, it is competent for *C* to prove, that he and *D* were members of the vestry of a church, on account of which the single bill was originally signed, to borrow money, and continued members thereof for a series of years; and that the fact of membership, and its continuance, as between *C* and *D*, might be proved by the acts and conduct of the parties, of which, parol proof was competent evidence. *Ib.*
19. An instrument of writing, reciting: "The vestry met agreeably to notice. Present *C*" and others, (not mentioning *D* as present,) "who resolved, that in order to finish the church, the vestry, or those of them who will consent to the plan, will agree to complete said church on their own responsibility," &c.—And to which was appended the following agreement: "We whose names are hereunto subscribed, do agree to exonerate *H* and *M* from any responsibility arising under the foregoing resolutions,"—signed by *C*, and *D*, and others,—is not evidence, *per se*, that *D*, who so signed, was a member of the vestry of said church at the time of the date thereof. *Ib.*
20. The defendant, by his examination of a witness in chief, proved, that the witness, as a constable, had sold the negro in controversy to him, and so in effect gave evidence of a sale under a *fi. fa.*, or some process of execution. Under such circumstances the plaintiff, by cross-examination of the same witness, will be permitted to give parol evidence of the undisclosed part of the contents of the *feri facias*. *Hume, et al., vs. Pumphrey*, 181.
21. In an action by an endorsee against the payee and endorser of a negotiable note, the maker is a competent witness to prove the execu-

EVIDENCE.—*Continued.*

- tion of the note by himself and partners, as makers, and the endorsement by the defendant. *Barry et al., vs. Crowley*, 194.
22. By the act of 1837, ch. 253, the legislature designed, as to the mode of proof of demand, and notice, to place foreign and inland bills upon the same footing; and, as regarded inland bills and notes, to dispense with the necessity of producing oral proof of demand and notice, by substituting therefor the protest of the notary, duly made. *Ib.*
23. In the case of foreign bills, the protest of a notary, duly authenticated by his seal, is received as proof of demand and notice, as therein stated. *Ib.*
24. When a protest, or an authenticated copy thereof, is offered in evidence, it must be received on the footing of the *lex fori*, and the only enquiry is, whether the protest has been duly made? *Ib.*
25. When the court can perceive that a seal is attached thereto, the protest is sufficiently authenticated; neither the seal, nor the signature of the notary, need be proved. *Ib.*
26. *W, S, D & C*, agreed to sell to *C* all the books, debts, credits, &c., of the firm of *S & W*, and of the firm of *D & S*, estimating the same at \$4526, for ten dollars in cash, and certain outstanding, enumerated notes of the two firms, amounting to \$5153.75, and *C* bound himself to pay said notes when due. In an action upon one of said notes of *S & W*, against *C*, the endorser, by the holder thereof, he proved, that he had already obtained judgment against *S*. HELD, that this agreement did not render *S* an incompetent witness in the cause, for the plaintiff. If the witness was compelled to pay the note, he could recover upon the agreement against *C*, and by paying the judgment against him, he would not be entitled to an assignment of it, as he was not a security for *C*. *Ib.*
27. *H*, in consideration of love and affection for his children, assigned to *J*, an account for medical services rendered, and medicines furnished to *C*, in trust, "that the proceeds of the said account when collected, after deducting the expenses thereof, shall be immediately applied to the exclusive benefit and advantage of his children, by *J*, the trustee." In an action by *J* against *C*, to recover the amount of the account, *H*, the assignor, is a competent witness to prove the rendition of the services by himself, and a promise to pay the same within three years before the institution of the suit. *Crawford vs. Brooke*, 213.
28. When objection is made to the competency of a witness, upon the ground of interest, the inquiry is, whether he is interested at the moment his testimony is tendered to the court?—if he then has no interest, he is competent. *Ib.*
29. A legal, certain, and immediate interest, in the event of the suit itself, or in the record as an instrument of evidence, in support of his own claims in a subsequent action, is necessary to render a witness incompetent. *Ib.*

EVIDENCE.—*Continued.*

30. The principal obligor in a bond is a competent witness to prove its execution by his surety therein, in an action on such bond, under the plea of *non est factum* by the surety. The witness is liable either to the plaintiff, or to the defendant, if he pays it, for the whole amount of the bond, and was therefore called to testify against his own interest in either event. *Buckingham vs. Clary*, 223.
31. In the year 1839, the owner of certain slaves told the plaintiff, a physician, who had been attending them a long time before, that if he would cure them, he might have them for their medical bill; and that he must make no charge against them from that time. The slaves were then small children, and of very little value. The plaintiff attended the negroes, and they recovered. They were never delivered to him, and their owner died in 1842, having them in his possession. Under notice from the plaintiff, to the defendant's executor, to produce the medical bill of the plaintiff against the owner of the slaves, from November 1841, to his death, in 1842, which the executor had paid after the institution of a replevin for the negroes. **HELD**, that the plaintiff might offer his own account, as evidence, that during the period embraced in it, he had not charged in it for medical services to the negroes in dispute, though it did contain charges for medicines, &c., to a negro child not named. *Mudd vs. Turton*, 233.
32. Whether the negro child, not named in the account, was one of the two, the subjects matter of the contract, was a question for the jury, and either party might have offered further evidence on that point. *Ib.*
33. The account produced under the notice, was primary evidence of what the plaintiff did claim for medical services. *Ib.*
34. A medical bill, which had accrued prior to the date of a contract, agreed to be surrendered, in consideration of a sale of slaves, is evidence of a valuable consideration passing from the vendee to the vendor. *Ib.*
35. The plaintiff declared on a single bill of the defendant, who pleaded payment specially to have been made at certain times, and in certain amounts, on which plea issue was joined. The defendant proved his plea by the production of various receipts of the plaintiff. The plaintiff then proposed to prove, orally, that he had two bills for the same sum, and that the receipts were applicable to the note not sued upon. **HELD**: that he must produce that one, or account for its non-production; otherwise, the parol proof was inadmissible. *Trundle vs. Williams*, 313.
36. The best evidence of the existence, character, and contents of a written instrument, is the instrument itself. *Ib.*
37. *B* filed his bill, charging a partnership, entered into between himself and three others, in a special business, by verbal contract; that it continued about a year, at the end of which time, he voluntarily withdrew, apprehending injury from the misconduct of his co-partners. The object of the bill was to procure an account, and

EVIDENCE.—*Continued.*

payment over of his portion of the profits. One of the partners, in his answer, denied the existence of the partnership, and claimed that *B* was employed by him for hire. The two other partners admitted the partnership in their answers, and consented to an account. HELD, that the answers of the two who admitted the partnership, were not evidence against the third partner, who denied its existence. *Bevans vs. Sullivan, et al.*, 383.

38. The general rule is, that the answer of one defendant is not evidence against his co-defendants. *Ib.*
39. The fact of the alleged existence of two partnerships, one of which was constituted of three persons, the other of the same three and another, will not make the answer of one of the three admitting the partnership, evidence, *as a partnership act*, against his other two partners, and thus establish the existence in fact of the partnership between the four, against the denial in the answer of one of the three partners. Such a state of facts does not make an exception to the general rule. *Ib.*
40. When one partner is permitted by his answer to testify against a firm, of which he is a partner, it ought to be, because he is testifying against himself, as a member of the firm. *Ib.*
41. In an action to recover compensation for injuries done to the person of plaintiff, by the negligence of the driver of a stage, which was thereby upset, the plaintiff cannot give in evidence, for the purpose of increasing the damages, that he had a wife and children. *Stockton vs. Fry*, 406.
42. Overturning a stage coach with passengers, is *prima facie* proof of negligence, in an action by an injured one to recover damages from the proprietors. *Ib.*

Evidence of a continuing title in a vessel, *see* SHIPS AND SHIPPING, 1.

Same—that an apparent absolute title at law, cannot be shown to be a trust. SHIPS AND SHIPPING, 2.

See PERSONAL PROPERTY, as to proof of possession and delivery thereof.

EXECUTION.—FI. FA. AND CA. SA.

1. As lands are sold for the payment of judgments under executions in this State, the debtor has not the right to compel the levy and execution of the writ upon all the lands. *Doub vs. Barnes, et al.*, 1.
2. At common law, the release of the debtor, whose person is in execution, is a release of the debt, and he cannot afterwards be arrested on the same judgment. *Harden vs. Campbell*, 29.
3. The law will not permit a creditor to proceed at the same time against the person and estate of his debtor, and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. *Ib.*
4. To a *scire facias* to revive a judgment, the defendant pleaded in bar his prior arrest upon a *ca. sa.*, his appearance in court at the return of the writ in custody, his being called, and answering in court that he was the party arrested, the refusal of the plaintiff to pray him in commitment, and his offer of himself to the sheriff, and the refusal

EXECUTION, &c.—*Continued.*

- of the sheriff to receive him into custody; upon general demurrer, held a bar to the writ. *Ib.*
5. The case of *West's executor, vs. Hyland*, 3 *Harris & Johnson*, 200, is imperfectly reported. In that case, the sheriff did not bring the body of the defendant into court on the return of the first *ca. sa.*, and the defendant, after its service, escaped from the custody of the sheriff, before the second *ca. sa.* was issued. *Ib.*
 6. An escape from the sheriff, without the consent of the creditor, does not prejudice him or extinguish his judgment. *Ib.*
 7. If a *fi. facias* be issued now within three years after the rendition of a judgment, it may be levied as well on land conveyed by the defendant after the judgment, as on lands belonging to him at the time of levying the *fi. fa.* *Warfield and Brewer, vs. Keefer*, 265.
 8. A party in custody, upon a writ of *ca. sa.*, issued upon a judgment rendered by a justice of the peace, upon a subject matter within his jurisdiction, cannot be discharged from such custody upon a writ of *Habeas Corpus*. *Bell vs. The State*, 301.
 9. Imprisonment under a judgment, cannot be unlawful, unless that judgment be an absolute nullity. *Ib.*
 10. Where the judgment on which an execution has been issued, is merely erroneous, and liable to be examined upon appeal from it, the writ of *Habeas Corpus* cannot be applied. *Ib.*

EXECUTOR—ADMINISTRATOR—ADMINISTRATION.

1. *W* died intestate, possessed of certain leasehold property, leaving a widow and children. The widow administered on his estate.—Engaging in trade she became indebted; mortgaged said property to an endorser on her own notes, which she paid away for her husband's debts, and immediately applied for relief under the insolvent laws. After this, she proceeded to collect the rents. Upon a bill filed by her permanent trustee, to vacate the mortgage and enjoin her from the collection of the rents, HELD: that as the estate of *W.* had not been distributed, as it appeared some of his debts were yet unpaid, the administratrix still held the property in that character, bound to rent it, and account for the rents as a part of *W's* estate. *Schwenniski and wife, et al., vs. Glenn, P. T.*, 23.
2. The permanent trustee might cite the administratrix before the orphans court to settle the estate, and upon its distribution might claim the widow's interest. *Ib.*
3. After probate of a will, and grant of letters testamentary, it is the duty of executors to appear to, and defend a caveat to the will, under which they are acting, and make all necessary preparations for its trial, upon its merits. *Compton vs. Barnes, et al.*, 55.
4. The employment of counsel for such purposes, is incidental to their duty; and it would be unjust not to allow to such executors, out of the estate of the deceased, the expenses necessarily incurred by them in the discharge of their duty. *Ib.*
5. The devisee of personal property in a will, has a right to call upon

EXECUTOR, &c.—*Continued.*

the orphans court, to determine upon the legality of an order of court, to employ counsel, and the reasonableness of the allowance to them under such an order. *Ib.*

6. A testator is not permitted to deprive his executor of a commission of not less than five per centum, by bequeathing him, by way of compensation, any thing which shall appear to the court to be an insufficient compensation. *McKim and Marriott, vs. Duncan*, 72.
7. A person by undertaking the office of executor does not elect, and is not bound to give effect to all the provisions to be found in a will. *Ib.*
8. A testator cannot by his will prevent his executors from collecting and accounting for debts due his estate; nor can he authorise any other person to receive it from his debtors. *Ib.*
9. A testator bequeathed to his three sons, to be equally divided between them, the whole of his capital used in his copper business, that may be standing to his credit after the payment of all debts and claims upon, or growing out of, that business. The capital in the copper company was returned by the executors in the schedule of debts due the deceased. HELD, that whether the testator was a partner of the firm engaged in the copper business with his sons, or only accommodated that firm, of which he was not a member, with a loan of money, could make no difference; that the money due the testator was a part of his personal estate, payable only to his executors; and when paid, constituted a part of the assets in their hands, to be by them accounted for in their settlements with the orphans court. *Ib.*
10. A testator bequeathed to his son certain shares of stock theretofore transferred to him by his said son, who was also one of the executors of his father's will. HELD, that with the appraised value of such stock the executors must be charged, and it must be regarded as a part of his estate, and not the stock of its former owner, though there was no proof how the testator became the absolute owner. *Ib.*
11. Upon the last two items the executors were held to be entitled to commissions. *Ib.*
12. A party administrator cannot deny in pleading, a fact, which his intestate has expressly admitted, under his hand and seal, in his bond. *Lloyd vs. Burgess*, 187.
13. Where a judgment is revived against executors only, the revived judgment does not bind the lands of the original defendant. *Warfield and Brewer, vs. Keefer*, 265.

FELONY. See INDICTMENT.

FRAUD—FRAUDULENT CONVEYANCES.

1. When the plaintiff claims under an assignment, in virtue of the act of 1829, ch. 51, the defendant may prove, that it was not made *bona fide*. *Crawford vs. Brook*, 213.
2. So when the assignor was examined as a witness, to sustain the right of action of his assignee under that act, the defendant may ask the witness, whether his account had, or had not, been assigned,

FRAUD, &c.—Continued.

because of its being barred by limitations, and for the purpose of making himself a witness to prove the rendition of the services charged therein, and the promise of the defendant to pay the same. *Ib.*

3. The defendant may impeach an assignment made for such purposes, on the ground of fraud. *Ib.*
4. When the plaintiff claimed as trustee, in virtue of a purely voluntary assignment, and as assignee, under the act of 1829, ch. 51, and the assignor was offered as a witness to sustain the claim, the defendant may examine into the motives for making the assignment. *Ib.*
5. When such an assignment was made, to enable the assignor to become a witness, and thus remove the bar of limitations, it cannot be regarded as *bona fide* made, within the act of 1829. *Ib.*

See ASSUMPSIT, 1, 2, 3.

COURT OF CHANCERY, 1, 2.

DEEDS, 1.

GUARANTOR—GUARANTEE—GUARANTY.

See CONTRACT, 1, 2.

EVIDENCE, 6 to 12.

HABEAS CORPUS.

1. A party in custody, upon a writ of *ca. sa.*, issued upon a judgment rendered by a justice of the peace, upon a subject matter within his jurisdiction, cannot be discharged from such custody upon a writ of *Habeas Corpus*. *Bell vs. The State*, 301.
2. An appeal from a judgment of the county court, overruling a motion for a discharge from custody upon the return of a *Habeas Corpus*, is not an appeal from a judgment or determination of that court, in a civil suit or action within the contemplation of the act of 1785, ch. 87. *Ib.*
3. The writ of *Habeas Corpus*, is a proceeding summary in its character, addressed to the discretion of the judge or tribunal, to whom application for it is made, so far as the discharge of the party is concerned. It is not final and conclusive upon such party. *Ib.*

HUSBAND AND WIFE.

1. All the covenants and agreements of a *feme covert*, (except in regard to separate property,) are null and void at law and in equity. She cannot be compelled to perform them, whether entered into by herself, or, on her behalf, by her husband, with or without her consent. *Burton, et al., vs. Marshall*, 487.
2. To restrain a married woman by injunction upon the footing of her contract, as if she were single, would, by indirect means, be an abuse of the process of the court. *Ib.*

INDICTMENT.

1. A count in an indictment charging a rape, may be united with another count charging an assault, with intent to commit a rape. This is no misjoinder under our system of criminal jurisprudence. *State vs. Sutton*, 494.

INDICTMENT.—*Continued.*

2. Where an indictment containing two counts, is submitted to the jury upon the plea of not guilty, it is their duty to find both issues in their verdict. *Ib.*
3. And if the jury find the prisoner guilty upon one issue, as upon the inferior offence, and do not find the other issue, the verdict should be set aside and a new trial awarded. *Ib.*
4. A verdict which is a nullity, does not, in legal contemplation, jeopard life or limb. *Ib.*

INFANCY—INFANT.

1. Proceedings in equity, filed by a guardian and *prochein ami* of an infant, to sell her lands, to which she was not summoned nor made a party, are not admissible evidence against her, or those claiming under her. *Hunter vs. Hatton and Kendrick*, 115.
1. It is a general principle, as well at law as in equity, that no person under the age of twenty-one years, is competent to make a binding contract, unless it be for necessities. *Browner and wife, vs. Franklin, et al*, 463.
2. No executory contract by him *bona fide* entered into, during minority, unless confirmed after arriving at years of maturity, can be decreed to be specifically performed by a court of equity; or enforced in a court of law. *Ib.*
3. Nor in the absence of such confirmation, when pursuing his legal rights in contravention of such contract, can the infant be restrained from so doing, by a court of equity interposing a prohibition by way of injunction. *Ib.*
4. Such an interference, to restrain the violation of a contract, is only warranted where the contract is susceptible of enforcement in a court of law, or in a court of equity. *Ib.*
5. An adult cannot enforce an executory contract with an infant, upon which the former has advanced the consideration, nor recover it in an action of assumpsit, where the specific and identical consideration has been parted with, by the infant. *Ib.*
6. If the infant have already advanced money upon a contract, which is executory upon the part of the adult, he cannot disaffirm it, and sue the other party for the advance, whenever it was paid on a valuable consideration, which has been partially enjoyed, and especially, if he had received the benefit of his contract. *Ib.*

See COURT OF CHANCERY.

PRACTICE IN EQUITY.

INJUNCTION.

1. To a bill by a *bona fide* purchaser, for an injunction, alleging, that certain debtors had conveyed property in trust for the payment of judgments, liens thereon, charging that the judgment creditors were aware of the trust, acquiesced in it, and designed to look to the proceeds of the land sold, and to be sold, under its provisions, for payment; the defendant, an assignee of some of the judgments, answered, that he had no personal knowledge of the complainant's

INJUNCTION.—*Continued.*

- equity, and denied the facts relied on in the bill, upon information which he had obtained. **HELD**: that such answer was not sufficient to dissolve the injunction. *Doub vs. Barnes, et al. 1.*
2. Upon the allegation of tenants in fee, that the defendants, confederating together, entered upon their land, cut down large quantities of wood, quarried large quantities of limestone, are continuing to cut down wood and quarry stone, and design to remove the same; that they have instituted actions of *t. q. c. f.*, for the said trespasses, which are now depending, an injunction will not be granted to restrain further acts of trespass or waste. *Hamilton, et al., vs. Ely, et al., 34.*
 3. In such a case, to authorise an injunction, the allegation, that the trespass was to the destruction of the inheritance, or, the mischief irreparable, is essential; and the facts must be stated, to show that the apprehension of further acts of trespass was well founded, to satisfy the conscience of the court. *Ib.*
 4. Where the bill charges a mere trespass, where the injury is not irreparable and destructive to the complainant's estate, but is susceptible of perfect pecuniary compensation, for which the party may obtain adequate satisfaction at law, and no charge of insolvency in the defendants, an injunction ought not to be granted. *Ib.*
 5. Under what circumstances will the quarrying of stone be considered an irreparable injury to the inheritance? *qr. Ib.*
 6. *S.* recovered a judgment against *K & Co.*, before a justice of the peace. Afterwards, *D* and *B* went before the justice to supersede the same; which appeared by an entry on the foot of the judgment, as follows: "Superseded by *D.* and *B.* for twelve months." The act of 1825, ch. 223, sec. 2, which gives the form of the entry of supersedeas, requires the insertion of the date of confessing it, as a part of the entry, which in this case was omitted. Upon a bill, filed by *D* and *B*, to restrain execution upon the supersedeas, after the lapse of twelve months, the county court dissolved the injunction as to *D*, and made it perpetual as to *B*. **HELD**, upon appeal by *D*, that it ought to have been made perpetual as to him. *Dilley vs. Shipley, et al., 48.*
 7. A court of chancery never will, against equity and conscience, interpose by way of injunction, to arrest the progress of proceedings at law, unless required to do so upon principles of public policy. *Craig and Angle, vs. Ankeney, 225.*
 8. One security cannot, by injunction, arrest the proceedings at law of his co-security against him, for contribution, unless he tenders the principal and interest due such co-security, who had paid the principal debtor; or allege, that he was ready and willing to bring the same into court to be paid to him, as a condition of the court's interference. *Ib.*
 9. Where a bill seeks no relief out of rents or profits, and merely calls for a sale of the realty, in aid of the personalty, the latter being alleged to be insufficient, and the defendants deny the existence of the debt on which the bill proceeds, the insufficiency of the per-

INJUNCTION.—*Continued.*

sonalty, and plead limitations, and the proof taken did not establish such insufficiency, the complainants cannot ask either for an injunction to restrain unskilful cultivation, the appointment of a receiver, or an occupation rent. *Warfield, et al., vs. Owens*, 364.

10. To entitle a creditor, seeking to sell real estate for the payment of debts, to an order for injunction to restrain wasteful or unskilful cultivation, the appointment of a receiver of the rents and profits, before decree, or payment of an occupation rent, as against the widow and infant heirs of the deceased debtor, he must show, that it was necessary for his protection from loss, or that he had a right to demand it, because of the certainty or strong probability, that the real and personal estate of the deceased, would be insufficient for the payment of all the creditors of the deceased. *Ib.*
11. Fear and belief, unsustained by facts establishing their probability, or showing them to be well founded, are not a sufficient foundation for the interposition of a court of equity, by way of injunction, or for the imposition of an occupation rent. *Ib.*
12. In June 1783, the owner in fee of a square of ground in the city of *Baltimore*, conveyed it to trustees to erect a *R. C.* church, and lay out a place of burial on the same, for the use of the *R. C.* of the said city. The deed declared, that if the trustees did not build, erect and complete the said church, and appropriate the residue of the square in laying out a burial ground for the use of the said persons, then it should be void, and the reversion in the grantors. No church was erected on the lot; but a church was erected by the same society of christians, upon a lot in the neighborhood, and the square conveyed, was used exclusively as a place of sepulture. The corporation of *Baltimore* paved the streets adjacent to the square; claimed the cost thereof as a paving tax, and to sell the square, in consequence of its non-payment for their reimbursement, or that of the persons who had paved the streets. Upon a bill filed by the pastor of the church actually built, and by one of its congregation, who, with others of that church, and its persuasion, had used the square as a place of burial from 1783, hitherto, for an injunction to restrain the proposed sale for taxes. **HELD**, that neither of the complainants had any interest, legal or equitable, for the protection of which they could claim the interposition of a court of equity. *Dolan and Foy, vs. M. & C. C. of Balt.*, 394.
13. *F* purchased of *M* and *S*, their interest in a tract of land; and took from *S*, then an infant, a bond of conveyance, with security, for the land, conditioned to convey, at a time after she came of age. All the purchase money was paid, and *F*, who had gone into, remained in possession; when *S* came of age, she refused to ratify the sale, execute a deed, or repay the purchase money, but brought ejectment in the name of herself and husband, to recover possession of her undivided interest. **HELD**: that she was not liable to be restrained by injunction. *Brewner and wife, vs. Franklin, et al.*, 463.

INJUNCTION.—*Continued.*

14. Where the object of a bill in equity is to obtain specific performance of a contract, and the writ of injunction is prayed for only to protect the property, the subject of the contract, against the wrongful acts of the defendant, pending the contest, and until the right to specific performance shall be determined, that writ cannot be maintained, unless the case presented by the bill, would authorise a court of equity to enforce the contract. *Geiger vs. Green*, 472.
15. *O* granted to *R*, "the privilege of digging and moving the ore on that part of my (*O*'s,) place, joining *W* and *P*'s, at twenty-five cents per ton, for the privilege of ground; leave also to build a house on said land, the workmanship to cost, &c., the materials to be got on my (*O*'s,) land, at *R*'s expense." This confers the mere privilege of digging ore; is not compulsory; imposed no corresponding obligations on *R*, who might refuse to work the mine, and *O* could not oblige him to work it. It contains no mutual or reciprocal engagements, and cannot be specifically enforced in equity: consequently there was no ground for granting or continuing an injunction upon its stipulations. *Ib.*
16. Upon a contract made by a husband for himself and his wife, that his wife should perform at the theatre of the manager named therein, during a certain period, for a certain salary, a court of equity will not enjoin the wife from performing at any other theatre, during the same period; nor the husband from permitting her to change her residence; nor another manager from giving her employment, within the term, as an actress; neither can specific execution of such a contract, as against the husband or wife, be decreed. *Burton et al., vs. Marshall*, 487.
17. Upon a contract, affirmative in all its provisions, the execution of which could not be enforced in equity, a court of equity cannot be asked to engraft upon it a negative stipulation, and restrain its breach by injunction. *Ib.*

See COURT OF CHANCERY.

DIVORCE, 6.

PRACTICE IN EQUITY.

IMPROVEMENTS.

1. In ascertaining the value of lasting improvements, whether they are to be estimated at their *original* cost, or at their *actual* value, at the time of the audit made—if the property only is recovered, then the estimate is to be made at the time of the audit; but if rents and profits are charged agreeably to the improved value, then, at the original cost; or if independently of improvements, at the value at the time of the audit. *Jones, adm'r of Hawkins, et al., vs. Jones*, 87.
2. Where the enhanced annual value of an estate was, in a great measure, the result of expenditures made in the melioration of the soil, substantial justice is done by considering the enhancement of the rents as a fair offset to the expenditure for melioration. *Ib.*
3. Improvements will be estimated at the time of the audit, in the absence of proof of their original cost, the time when they were made, and their depreciation since, if any. *Ib.*

IMPROVEMENTS.—*Continued.*

4. Ditching and grubbing meadow land, may be necessary, lasting, and valuable improvements; and if so, upon the proof must be allowed for accordingly. *Ib.*

INSOLVENT DEBTOR.

1. Where the grantor in a deed never becomes an applicant for relief under our insolvent laws, it cannot be pretended that his deed was made with a view of becoming an insolvent debtor. *Wheeler, et al., vs. Stone, et al.*, 38.
2. In 1839, *B* conveyed to *P* and *Y*, certain real and personal property, in trust, to pay his creditors, of which he retained possession, and the rents and profits of which he was to receive and enjoy, until the sale thereof by the trustees. In 1840, *B* applied for relief under the insolvent laws. He executed a deed of all his property to *M*, under that application; but omitted in his schedule of effects to take any notice of rent due him on account of a parcel of land conveyed to *P* and *Y*. In 1842, an attachment in virtue of a judgment recovered against *B*, in 1839, was laid in the hands of the appellee, at the suit of the appellant. The garnishee admitted a balance of rent due *B*, arising out of grain grown upon the lands in question, but did not state when he had rented, or when the rent became due.

HELD:

1. That the proceedings of *B*, to obtain relief under the insolvent laws, were competent evidence on behalf of the garnishee; and that the schedule, and other papers relating to the application, were necessary to lay a foundation for the deed of *B* to *M*, his trustee.
- 2nd. That if the rent due from the garnishee accrued after the deed to *M*, and out of the land mentioned in the deed and schedule, it belonged to the trustee under the insolvent law.
- 3rd. But if the rent accrued to *B*, before his application for relief, in 1840, as it was not mentioned nor included in his schedule of effects, then, under the act of 1827, chap. 70, sec. 7, it was liable to be attached by the plaintiff. *Hupe vs. Seibert*, 240.

See EXECUTOR, 1, 2.

IRREGULARITY.

See PRACTICE, 21, 22.

JOINT TENANCY.

1. The act of 1822, ch. 162, which declares, that no deed, &c., shall be construed to create an estate in joint tenancy, unless in such deed, &c., it is expressly provided, that the property thereby conveyed, is to be held in joint tenancy, does not affect a deed to *H* and wife, and their heirs and assigns, forever, and to the survivor of them. Such a deed does not create a joint tenancy. *Craft vs. Wilcox*, 504.
2. And if it did, the term survivor in the deed, clearly indicates the intention, that there shall exist a right of survivorship. *Ib.*

See REPLEVIN, 1, as to impersonalty.

JUDGMENT.

1. At common law, the release of the debtor, whose person is in execution, is a release of the debt, and he cannot afterwards be arrested on the same judgment. *Harden vs. Campbell*, 29.
2. The law will not permit a creditor to proceed at the same time against the person and estate of his debtor, and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. *Ib.*
3. If the design of a *scire facias* be, to make the land of the original defendant, in the hands of his alienees, liable for a judgment, it is the practice in this State to make both the original defendant and his terre-tenants parties to the writ, by which the judgment is to be revived. *Warfield and Brewer vs. Keefer*, 265.
4. If a *fi. fa.* be issued now within three years after the rendition of a judgment, it may be levied as well on land conveyed by the defendant after the judgment, as on lands belonging to him at the time of levying the *fi. fa.* *Ib.*
5. But, when the plaintiff has suffered his judgment to die, and a *sci. fa.* is necessary to reanimate it, the law presumes it to be satisfied, and where the freehold is to be affected, the tenant thereof should be made a party to protect it. *Ib.*
6. Where a judgment is revived against executors only, the revived judgment does not bind the lands of the original defendant. *Ib.*

See SETT-OFF, 3.

JURISDICTION.

See COURT OF CHANCERY, 15.

LACHES. See ASSUMPSIT, 3.

LANDLORD AND TENANT.

1. *K* rented a farm from *A*, upon the following terms:—he was to give to *A* one-half of every thing that was made. The tenant was to carry all the crops to market, and to pay *A* one-half of the proceeds, after sale. Under this contract, *K* made a crop of tobacco, and assigned in writing all his interest therein to *F*, who was to have the crop prepared for market and sold, and to pay over to *A* one-half of the net proceeds. The tobacco was left in the possession of *A*'s agent, and the tenant retained possession of no part thereof, after the execution of his agreement with *F*. HELD: that the contract between *K* and *A* created the relation of landlord and tenant; that it vested in each a joint interest in the crop, and that neither *K* nor his assignee, could maintain an action of replevin for it against *A*. *Ferrall vs. Kent*, 209.

LEGACY—LEGATEE.

See WILL AND TESTAMENT, 1, 2, 3.

LIBERUM TENEMENTUM.

See TRESPASS, 1, 2, 3, 4.

LIEN. See COURT OF CHANCERY, No. 1 to 7.

LIMITATION OF ACTIONS.

1. In the year 1826, the owner of a negro slave conveyed her in trust for the sole and exclusive use of his daughter, during the time she may live and remain unmarried, or for life; and after her death or marriage, until such time as the eldest of her children shall come of age or be married, on which event the trustee was directed to convey the same absolutely unto the children of the grantor's daughter. The mother married again in 1842; and in 1844 the trustee conveyed the property to the grand-children. In an action of *trover* for the slave, brought by the grand-children a few days after the conveyance to them, and after demand and refusal, the defendant proved, that he had been in possession of the slave some five or six years, using and claiming her as his own, and that the trustee was frequently in the county where the defendant resided during that time. **Held**, that this case was within that class of cases, where not only adverse possession and claim of title for the time limited by the act of Assembly, are necessary to bar the plaintiff's recovery, but it must be made appear to the jury, that such adverse possession and claim of the defendant, were known to the trustee three years before the institution of the suit. *Hume, et al., vs. Pumphrey*, 181.
2. Where a slave was conveyed in trust for the use of *A*, for life, and after her death the trustee was directed to convey the same to *B*, and neither the trustee, nor *B*, were entitled to the possession during the life of *A*, there can be no presumption of knowledge on the part of the trustee, that the claim or possession of another party claiming under *A*, was adverse to his right. *Ib.*
3. Where the defendant said, within three years of action brought, in a conversation respecting the plaintiff's account, it had been presented to him before by the clerk of the plaintiff, and that he had stated to the clerk, he would settle the account if the plaintiff would take off the interest, the account being also proved, the defendant cannot insist that the evidence is not sufficient to take the claim out of the act of limitations. *Brookes vs. Chesley*, 205.

See *SCIRE FACIAS*, 4, 5, 6.

MANDAMUS.

1. A *Mandamus*, is not a proper remedy to restore a rightful vestry, to the possession of church property, wrongfully withheld. *Smith, et al., vs. Erb, et al.*, 437.
2. One writ of *Mandamus* cannot issue for the enforcement of separate claims. *Ib.*
3. Even if parties at one time were entitled to a writ of *Mandamus*, still, if by lapse of time, or subsequent circumstances, they are not entitled to it when it is claimed to be awarded, it will not be granted. *Ib.*

MATERIAL MEN.

See *SHIPS AND SHIPPING*, 1, 2, 3.

MAYOR AND CITY COUNCIL OF BALTIMORE.

1. By the act of 1821, chap. 252, for the more perfect security of the basin and harbor of *Baltimore*, the corporation of that city were

MAYOR AND CITY COUNCIL OF BALTIMORE.—*Continued.*

empowered, whenever it might deem the same necessary, to compel individuals, companies, or bodies politic, owning property binding on *Jones Falls*, within the limits of the city, to wall up the same; on the refusal or neglect of any proprietor thereof to make such wall, after three months' notice from the commissioners of the city, which they were authorized to give: **HELD**, by the county court, and affirmed by a division of this court, that the act, in question, was unconstitutional and void. *Mayor &c., of Baltimore vs. Lefferman*, 425.

2. The corporation of the city of *Baltimore*, under the act of 1821, chap 252, and its ordinances, passed to carry said act into execution, notified the plaintiff to build a wall adjoining his property on *Jones Falls*; and that upon his failure to commence the same before a given day, they would erect the same at his cost. The plaintiff built the wall at his own cost, and then brought his action of *assumpsit* against the city, to recover the amount of his expenditure. **Held**: that although the act of 1821 was void, still, the payments made by the plaintiff were *voluntary*; made with a full knowledge of all the facts and circumstances of the case; in ignorance, only, of his legal rights; without fraud, imposition, or any undue advantage taken of the plaintiff: and therefore, the amount paid could not be recovered back. *Id.*

MEASURE OF DAMAGES.

See COMMON CARRIERS.

MORTGAGE—MORTGAGOR—MORTGAGEE.

See COURT OF CHANCERY, 11.

SHIPS AND SHIPPING, 2.

NEGLIGENCE.

See COMMON CARRIERS.

NEGROES AND SLAVES.

1. By the statute law of *Maryland* upon the subject of slavery, a claim to freedom can only be established by the judgment of a court of law, and the petition must originate in the county where the petitioner resides, under the direction of his owner. *Peters, et al., vs. Van Lear*, 249.
2. Chancery, in this case, cannot pronounce, by its decree, the freedom of the complainants, but may direct the executor to execute deeds of manumission, and thus enable them to assert their claim to freedom in a court of law. *Id.*
3. By the laws of this State, a slave possesses no civil rights, and, as a general proposition, it is true, that he is incapable of instituting a suit, either in a court of law or equity. *Id.*
4. But, by the act of 1796, ch. 67, sec. 21, he has been made capable of acquiring freedom by deed or will; his ability to assert his right to freedom is therefore recognised, though, pending the controversy, he is treated as a slave. *Id.*

NEGROES AND SLAVES.—*Continued.*

5. The complainants here are under the necessity of invoking the aid of equity, that an execution of the power created by the will may be enforced. *Ib.*
6. Equity has no power to determine, by decree, the right to freedom, nor to order an account of the value of the services of the complainants while detained as slaves. *Ib.*

OCCUPATION RENT.

See INJUNCTION, 9, 10, 11.

ORPHANS COURT.

1. A testator by his last will declared, that neither of his executors should be entitled to any commissions for settling his estate, but that all necessary expenses relative to such settlement, should be charged to his estate. The orphans court allowed the executors a commission of six per centum. This was, however, cancelled by consent, and the question of commissions presented to that court *de novo*, when they decreed the executors were not entitled to any such allowance. HELD, upon appeal, that the executors were entitled to the commissions which had been previously allowed them. *McKim and Marriott, vs. Duncan*, 72.
2. If the acts of Assembly of this State do not expressly grant to the orphans court, power to allow executors commissions in such cases as those mentioned in the testator's will, no commissions can be claimed by them. *Ib.*
3. The act of 1798, chap. 101, which declares that the commissions of an executor shall be, at the discretion of the court, not under five, nor exceeding ten per centum, on the amount of the inventory or inventories, excluding what is lost or has perished, and prescribes the manner in which the account of an executor must be made out, confers upon the orphans court the power in this, as it does in all other cases, to allow a commission. *Ib.*
4. A testator cannot take from the orphans court a power which the law gives it. *Ib.*
5. The will of a testator is to be regarded in the administration of his estate; but this general rule is to be taken with this proviso, that such will be not inconsistent with the law. *Ib.*
6. The 2nd sec., sub. chap. 20, act of 1798, chap. 101, must be read in connexion with the 5th sec., 14th sub. chap. of the same act. *Ib.*
7. The first clause makes it the duty of the court in all cases to allow commissions to executors. The other makes one exception to that rule. *Ib.*

See EXECUTOR.

PARTIES IN EQUITY.

See PRACTICE IN EQUITY.

PARTNERSHIP—PARTNERS.

1. Every reasonable presumption will be made against those partners, whose fault it is that the books of accounts of a partnership are imperfectly kept; and if they claim to be entitled to other credits

PARTNERSHIP—PARTNERS.—*Continued.*

- than those to which the books, at the close of the partnership, entitle them, it is usual to require of them very strict proof. *Bevans vs. Sullivan, et al.*, 383.
2. Circumstances stated, under which a court of equity will infer the existence of a partnership, in opposition to an answer denying it. *Ib.*
 3. Where a bill alleged a partnership to have commenced and terminated at a particular day, and the proof established its commencement, a partner who insists that it was dissolved at an earlier period than that alleged, will have to prove it. *Ib.*
 4. For personal services rendered by a partner, no compensation can be claimed, without proof of an express agreement, that he should be compensated for them. *Ib.*
 5. The members of a firm are individually liable in actions of *tort*, for the acts of the firm, their agents and servants, and for such acts may be sued individually. *qr. Ib.*

PERSONAL PROPERTY.

1. A party in possession of personal property, exercising acts of ownership over it, must be treated as the owner until the contrary appears. *Van Brunt vs. Pike and Ward*, 270.
2. A quantity of pig iron on the bank of a canal in *Frederick* county, under the care of *one* agent of the owner, was sold by another of his agents in *Baltimore*, who gave his receipt to the purchaser for the purchase money. The purchaser wrote to the agent in *Frederick*, to ship the iron to his agent at another place. *HELD*, that these facts constituted a constructive delivery of the iron to the purchaser. *Ib.*
3. In relation to a ponderous article of merchandise, incapable in the ordinary course of business of actual delivery, as *pig iron*, all the law requires to change the possession after a sale, is constructive delivery. *Ib.*

PLEAS AND PLEADING.

1. The declaration alleged, that a note on which the suit was brought, was made at the county aforesaid, when the note in fact was dated at the city of *W*; this is no variance. *Barry, et al., vs. Crowley*, 194.
2. In declaring upon an assignment, made under act 1829, ch. 51, the plaintiff need neither aver a promise by the defendant to pay him the account, nor that he was *bona fide* entitled to the account, nor that it was *bona fide* assigned to him. *Crawford vs. Brooke*, 213.
3. In 1822, a judgment was rendered, which was revived in 1832. In 1842, a second *scire facias* was sued out, by the assignee of the judgment against the original defendant and his tenants of the land of which he was seized, in 1822. This writ was returned *nihil*, as to the original defendant; and made known to his terre-tenants, who appeared and pleaded limitations in bar of the writ, to which the plaintiff demurred. The *scire facias* set out the original judgment, and the subsequent proceedings thereon. *HELD*, that as the

PLEAS AND PLEADING.—*Continued.*

scire facias did not show at what period the original defendant aliened his land, whether immediately after the original judgment, in 1822, or not until a *fiat* was obtained against him, in 1832, the absence of this necessary averment was fatal to it upon demurrer, as respected the *terre-tenants*, not proceeded against until 1842. *Warfield and Brewer vs. Keifer*, 265.

4. A deputy of the collector of a county may be described in pleading, as the deputy collector of *W* county, or as the deputy collector of *M*, collector of *W* county. Such officers have the appellation of deputy collectors of a county in common parlance, and are generally known by it. *Post and Fitzhugh, vs. Sheppard*, 276.
5. Where a coach belonged to the *R.* line, which line belonged to the *N. R. Stage Company*, a co-partnership, composed of the firm of *S., F. & Co.*, and of *M* and *B*, and the firm of *S., F. & Co.*, was composed of the *defendant*, and *M*, and others, and that all the drivers and coaches of the line belonged to the *N. R. Company*; that the defendant had no other connexion with the line than as one of the firm of *S. F. & Co.*, and was declared against, as the owner of the line, in an action upon the case, for the negligent driving of one of the coaches by him used and employed, and pleaded not guilty, there is no variance between the pleadings and the proof. *Stockton vs. Fry*, 406.
6. Upon a bond, reciting, "whereas the above bound *S* and *P* have obtained an injunction to stay proceedings at law, and judgment rendered against them in," &c., with condition to "prosecute the said writ of injunction with effect, and satisfy and pay, as well the judgment as all costs," &c., that shall accrue in the chancery court, or be occasioned by delay of the execution, &c., unless the court of chancery shall decree to the contrary, and shall, in all things, obey such order and decree as the court of chancery shall make in the premises, the obligors cannot plead in bar, that the parties did not obtain any injunction from the court of chancery. *Lloyd vs. Burgess*, 187.
7. A party administrator cannot deny in pleading, a fact, which his intestate has expressly admitted, under his hand and seal, in his bond. *Ib.*
8. A party is estopped from denying a fact recited in his deed. *Ib.*
9. The rejoinder of general performance to a replication, assigning breaches of a condition, is defective on general demurrer. *Ib.*
10. Courts of law, upon general demurrer, will give judgment against the party who commits the first error in pleading. *Ib.*
11. A plea in bar, to an action on an injunction bond, which set up as a defence to a breach of the condition, that after the writ of injunction obtained against two defendants, both prosecuted with effect their bill, until the death of one; that the survivor also prosecuted with effect, until his death; that no administration had been obtained upon the estate of either, and that afterwards it was so proceeded

PLEAS AND PLEADING.—*Continued.*

in, that the said injunction was dissolved by the final order of the court of chancery, is no defence. The courts of law must consider the order of the court of chancery as regularly and legally passed, and will not assume, that the chancery cause abated by the death of the complainants, contrary to the allegation of the plea. *Ib.*

See INDICTMENT.

PRACTICE.

TRESPASS, 1, 2, 3, 4.

PLEAS AND PLEADING IN EQUITY.

1. To authorise an injunction, the allegation, that the trespass was to the destruction of the inheritance; or, the mischief irreparable, is essential; and the facts must be stated, to show that the apprehension of further acts of trespass was well founded, to satisfy the conscience of the court. *Hamilton, et al., vs. Ely, et al.* 34.
2. Where the bill charges a mere trespass, where the injury is not irreparable and destructive to the complainant's estate, but is susceptible of perfect pecuniary compensation, for which the party may obtain adequate satisfaction at law, and no charge of insolvency in the defendants, an injunction ought not to be granted. *Ib.*

POWERS. See TRUST.

PRACTICE.

1. Where the issue upon general demurrer definitively settles the law of the case against the plaintiff, the issues in fact are not to be tried. *Thompson vs. State, use of adm'r of Ford*, 163.
2. A defendant who appears in a cause, and after a general imparlance pleads the general issue to the plaintiff's declaration, cannot, because of a leave granted to the plaintiff to amend, plead in abatement a variance between the writ and the second nar. *Chapman, adm'r, vs. Davis, exc'x*, 166.
3. The court will not receive a plea in abatement, grounded on such a variance, to an amended declaration filed after a general imparlance. *Ib.*
4. When a party has, by the character of his pleadings, waived all objections to the capacity of the plaintiff, or any other abateable matter then existing, he cannot be allowed to resume the objection. *Ib.*
5. A defendant cannot plead in abatement, a variance between the writ and count, without demanding *oyer* of the writ. *Ib.*
6. The writ, without *oyer*, is no part of the pleadings, or even the proceedings in the cause. *Ib.*
7. Where a plaintiff sues out a writ as administrator, and declares as executor, it is a variance which a defendant may plead in abatement, if he presents the objection in due time, and in a proper mode. *Ib.*
8. In cases where the plaintiff can only maintain an action in his individual capacity, the addition of the word, administrator, may be treated as superfluous. *Ib.*
9. But where the plaintiff can maintain his action either in his personal or representative character, he is bound by his election. *Ib.*

PRACTICE.—*Continued.*

10. Where affidavits filed in a cause, show that a plea in abatement was tendered by a defendant, immediately upon the declaration being amended, and the rule to plead laid, and to which plea a *ne recipiatur* was directed by the court, it was the duty of the clerk to have entered these proceedings upon the record, and having omitted to do so, the county court below, after appeal, upon transmission of the record to them, under a writ of diminution, may order the record to be corrected, and certified anew to this court. *Ib.*
11. The rejoinder of a general performance to a replication, assigning breaches of a condition, is defective on general demurrer. *Lloyd vs. Burgess*, 187.
12. Courts of law, upon general demurrer, will give judgment against the party who commits the first error in pleading. *Ib.*
13. Where the judges of the county court are equally divided upon the admissibility of evidence, it is not suffered to go to the jury. *Ferrall vs. Kent*, 209.
14. But if the proof has been received, and the division arises upon a motion to strike it out, then the motion is lost. *Ib.*
15. When objection is made to the competency of a witness, upon the ground of interest, the inquiry is, whether he is interested at the moment his testimony is tendered to the court?—if he then has no interest, he is competent. *Crawford vs. Brooke*, 213.
16. Where there was no evidence when a rent, which was payable in grain, accrued; but its accrual was admitted to be after October 1839, and not stated, whether before or after May 1840. The time when the grain was grown, which was in controversy, was a question of fact for the jury, and the county court erred in instructing them they must find a verdict for the defendant. *Hupe vs. Seibert*, 240.
17. But, when the plaintiff has suffered his judgment to die, and a *sci. fa.* is necessary to reanimate it, the law presumes it to be satisfied, and where the freehold is to be affected, the tenant thereof should be made a party to protect it. *Warfield and Brewer, vs. Keefer*, 265.
18. Upon a general demurrer, the court enquires, who committed the first error in pleading? *Ib.*
19. Where a party is in possession of an article intended to be affected by an attachment, he should be returned by the sheriff, as the garnishee. *Van Brunt vs. Pike and Ward*, 270.
20. Where there had been a valid sale and delivery of personal property, the act of 1834, ch. 79, which required the transfer of a non-resident to be recorded, does not apply. *Ib.*
21. At the return term of the writ, in November, as shown by the docket entries, the defendant gave special bail, appeared, and the cause was continued to the March term, under a rule to plead. The rule-days to plead were the first Mondays of March and November. The declaration was filed on the first Monday of February. Before the March rule-day, the defendant's counsel called at the clerk's office, examined the papers of the cause, and remarked, there was yet time

PRACTICE.—*Continued.*

enough to plead limitations. At the March term, the defendant obtained a rule nisi, to strike out the bail and appearance, upon the ground, that they had been erroneously entered, as he had not offered bail, nor appeared to the cause. The county court discharged the rule, and no motion being made, or plea offered, by the defendant, entered up judgment upon the cause of action, a promissory note of the defendants. HELD, that the defendant, under the circumstances, had recognized the entry of bail and appearance, and as he was not precluded from pleading to the merits, the rule was properly discharged. *Schleigh and Kershner, vs. Hagerstown Bank*, 306.

22. It was the duty of the defendant to have appeared at the return of the writ, and to enforce the rule, would be to let the amercement against the sheriff stand, and enable the defendant to plead limitations. The refusal of the rule, deprived the defendant of no meritorious defence.

Ib.

23. On or about the day on which a foreign commission was sent off, to take evidence out of the State, the plaintiff, upon whose motion it was granted, did not file in court, but served a copy of his interrogatories on the defendant. This is not such reasonable notice, as would give the defendant time to exhibit his cross-interrogatories, before the transmission of the commission. *Parker vs. Sedwick*, 318.

24. In such a case, the plaintiff ought to show affirmatively, that the defendant had reasonable time from the service of the notice, to the time when the commission was sent out, to have filed cross-interrogatories, if he desired it. Otherwise, the proceedings under such a commission, cannot be read to the jury. *Ib.*

25. The service of notice of interrogatories on the opposite party, in the execution of a foreign commission, is to accomplish the same end, as notice of the time and place of executing a domestic commission would. *Ib.*

26. If evidence be inadmissible on any ground, when objected to as inadmissible, it ought not to be received; and in reviewing such an objection, this court is not confined to the erroneous reasons of the county court, for rejecting it. *Ib.*

27. In an action upon a promissory note, in the name of the endorsee, *bona fide*, and for valuable consideration, a demand in favor of the maker against the endorser, is not admissible as a set-off, although the note may have been discredited when the endorser took it. *Annan vs. Houck*, 325.

28. A set-off is confined to mutual debts between the plaintiff and defendant. It is a privilege unknown to the common law. *Ib.*

29. Courts of law, upon application to them, set off a judgment which the defendant has against the plaintiff, against another judgment which the latter has against the former. *Ib.*

30. After a cause had been committed to the jury, and partly argued before them, on both sides, it was discovered, that several interrogatories, propounded by the plaintiff to witnesses, under a foreign commission,

PRACTICE.—Continued.

- had not been filed with the clerk of the county court, before they were propounded, nor copies served on the defendant, nor notice thereof in any way given him ; but that they were first filed with the commissioners, at the place of executing the commission, it is too late, under the 20th rule of *Baltimore* county court, to move to strike out the evidence of such witnesses, which had been read to the jury. *Stockton vs. Frey*, 406.
31. A count in an indictment charging a rape, may be united with another count charging an assault, with intent to commit a rape. This is no misjoinder under our system of criminal jurisprudence. *State vs. Sutton*, 494.
 32. Where an indictment containing two counts, is submitted to the jury upon the plea of not guilty, it is their duty to find both issues in their verdict. *Ib.*
 33. And if the jury find the prisoner guilty upon one issue, as upon the inferior offence, and do not find the other issue, the verdict should be set aside and a new trial awarded. *Ib.*
 34. A verdict which is a nullity, does not, in legal contemplation, jeopard life or limb. *Ib.*

PRACTICE IN THE COURT OF APPEALS.

1. An appeal taken from an order of the court of chancery, prohibiting the sale of property, after the lapse of nine months from its passage, dismissed, as not being taken within the time prescribed by law. *Wheeler, et al., vs. Stone, et al.*, 38.
2. No appeal will lie from an order of a court of chancery, requiring a trustee, a defendant in the cause, to bring money and securities in his hands into court,—nor from an order directing the clerk of the court to deposite money brought into court, in bank, and referring the case to the auditor, with directions to distribute such money according to legal priorities,—nor from an order referring the cause to the auditor, with directions to state an account from the pleadings and proofs. *Ib.*
3. From mere practical, preparative orders, made in the progress of a cause, not final in their nature, and which do not profess to determine the question of right between the parties, no appeal lies. *Ib.*
4. An order for the sale of real and personal property, is the subject of an appeal under the act of 1841, ch. 11, sec. 1. *Ib.*
5. Where an appeal comes up on a case stated, it must be decided by the facts agreed on. Legal presumptions may be made, and necessary conclusions drawn, but inferences from facts, which may, or may not, be true, cannot be made by the court. *Van Brunt, vs. Pike and Ward*, 270.
6. An appeal from a judgment of the county court, overruling a motion for a discharge from custody upon the return of a *Habeas Corpus*, is not an appeal from a judgment or determination of that court, in a civil suit or action within the contemplation of the act of 1785, ch. 87. *Bell vs. The State*, 301.

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

7. Under the act of 1825, ch. 117, this court cannot reverse the judgment of the county court, except upon a point decided by the court below, and as no motion was made to that court in relation to it, nor its attention called thereto, no question affecting it is open here for review, even if it were erroneous. *Schleigh and Kershner, vs. Hagerstown Bank*, 307.
8. Under the act of 1830, chap. 186, where judgment of the county court rendered upon exceptions, affirmed by the Court of Appeals, would not be a bar to another action by the same plaintiff against the same defendant, by reason of a variance, which the plaintiff might cure by amendment, if permitted, and having merits, this court will award a procedendo and a new trial. *Parker vs. Sedwick*, 318.
9. A prayer which enumerates the facts, to comply with which, constitutes the duty of the defendant, and that upon a failure in any one of the particulars enumerated, if so found by the jury, then, in point of law, the defendant did not perform his duty, but was guilty of negligence, and is responsible for the injury sustained by the plaintiff from such failure, does not raise any question upon the pleadings; it merely asks the court to instruct the jury, that the hypothesis of the prayer is the law of the case, if supported by the evidence. *Stockton vs. Frey*, 406.
10. In granting or refusing any prayer asking an instruction to the jury, that if they believe certain facts, the plaintiff is, or is not, entitled to recover, this court will not assume, that the county court inspected the pleadings in the cause, and adjudged their sufficiency to sustain the prayer. *Ib.*
11. If either party designs to raise any question upon the pleadings in an action at law, their prayer under the act of 1825, ch 117, should be framed with a direct reference to the pleadings. *Ib.*
12. Where a prayer may have a tendency to mislead a jury in reference to the evidence in the cause, as where it only incorporates a part of the evidence which constituted the defence, when it should have incorporated the whole, and prays, that notwithstanding the jury should believe the part embodied in the instruction, still the plaintiff is entitled to recover, it is error to grant it. *Ib.*
13. Where the court is of opinion, that the plaintiff cannot recover, as where there is an admission of satisfaction of his demand, they will not, upon the reversal of the judgment, upon the appeal of the defendant, award a procedendo. *Ib.*
14. Where a bill for an injunction states no proper case, and it is not aided by the answers, under the act of 1835, chap. 380, the court may either dissolve the injunction and remand the cause, or dismiss the bill; but if it appears to the court, that although the injunction was properly dissolved, yet the complainant may have relief by amendment, it will, after dissolving the injunction, remand the cause for amendment and further proceedings. *Brawner and wife, vs. Franklin, et al.*, 463.

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

15. Upon an appeal against continuing an injunction, if the Court of Appeals perceives that the complainant has, and can have, no equity at final hearing, the bill will be dismissed, *Geiger vs. Green*, 472.

PRACTICE IN EQUITY.

1. To a bill by a *bona fide* purchaser, for an injunction, alleging, that certain debtors had conveyed property in trust for the payment of judgments, liens thereon, charging that the judgment creditors were aware of the trust, acquiesced in it, and designed to look to the proceeds of the land sold, and to be sold, under its provisions, for payment; the defendant, an assignee of some of the judgments, answered, that he had no personal knowledge of the complainant's equity, and denied the facts relied on in the bill, upon information which he had obtained. HELD: that such answer was not sufficient to dissolve the injunction. *Doub vs. Barnes, et al.*, 1.
2. Where a bill upon which an injunction had been granted, was removed from the county court to the court of chancery, and the chancellor refused to revise, alter, or reverse the order for the writ, on a motion to dissolve, because he could not interfere with the prior action of the other court, upon appeal, such order was reversed, and the injunction dissolved. *Schwenniski, et al., vs. Glenn, P. T.*, 23.
3. The act of 1818, chap. 133, does not repeal that part of the act of 1816, chap. 154, which requires infants to be made parties to proceedings in respect to sales of their real estates, when deemed beneficial to their interests. *Hunter vs. Hatton and Kendrick*, 115.
4. The act of 1818, is only in conflict with that of 1816, in relation to the evidence to be adduced to the court to satisfy it, that the sales which it is called on to decree, would be for the interest and advantage of the infant. *Ib.*
5. The act of 1816, left the court to its ordinary mode of obtaining information as to matters of fact; but the 2nd sec. of the act of 1818, provided for the issuing of a commission to not less than three discreet and sensible men, freeholders of the county wherein the lands should lie, the sale of which is applied for. *Ib.*
6. As well now, as before the act of 1818, the infant, if a resident of the State, must be summoned to answer the petition filed by his guardian or *prochein ami*, and must appear by guardian to be appointed by the court, before the commission under the act of 1818 can rightfully issue. *Ib.*
7. The guardian of the infant, thus appearing, has a right to be heard and represented in the naming of the commissioners; in the examination of the evidence to be adduced before them, and in the action of the court upon the return of the commissioners. *Ib.*
8. By the terms of the 22nd sec. of the act of 1820, chap. 191, the bond given for the purchase money of land sold under that act, is required to be with condition, to pay the money over to the representatives of the deceased, "in such proportions as each may be entitled to, agreeably to the order of the court" by which the sale was adjudged.

PRACTICE IN EQUITY.—*Continued.*

- Until the court has passed an order ascertaining the proportion to which a representative is entitled, he cannot maintain an action on such bond. *Thompson vs. State, use of adm'r of Ford*, 163.
9. Where a cause is set down for final hearing upon bill and answer, the averments of the bill are qualified by those in the answer. *Craig and Angle vs. Ankeney*, 225.
 10. Slaves claiming a right to freedom under the same will, each having a common interest in arresting a perversion of a trust created by it, affecting their right, may unite in the same bill to compel the executor to perform such a trust; and it is no misjoinder. *Peters, et al., vs. Van Lear*, 249.
 11. The two executors named in this will, *who renounced*, ought not to have been made defendants, and the bill as to them should be dismissed. It was only necessary to proceed against the party whose duty it was to execute the deeds of manumission, in pursuance of the power created by the will. *Ib.*
 12. In this case, the grantors of the deeds for the *Illinois* land were not parties. In their absence, the court could not assume their title of no value, and cancel those deeds. To give relief, by restoring possession of the *Maryland* lands, would be to enable *M* to regain them, while he retained title to the *Illinois*, and a right to sue on the covenants to him. *Middlekauff vs. Barrick, et al.*, 290.
 13. By the act of 1840, ch. 109, sales made and reported during the recess of the county courts, by any trustee, under their decree, on being filed in their clerk's office, shall stand for final ratification, *provided* there be entered on the docket, a notice of motion for final ratification, to be given or published in such form as the rules of said courts may respectively prescribe. The rule of *M.* county court ordered, *that such notice*, at least one month before final ratification, be served upon all the parties therein, or published, &c. A notice was entered on the 16th May. Service admitted by the complainant on the 18th; and given to the defendant on the 1st June. On the 2nd July, the sale was ratified. *HELD*, that the act and rule were strictly complied with. *Dawes vs. Thomas*, 333.
 14. Where the decree for a sale ordered the appointed trustee to give bond in the penalty of a prescribed sum; he gave bond for a less sum, which was accepted by the court and approved, and he proceeded to make and report a sale, this is no ground to vacate an order of final ratification. *Ib.*
 15. In sales, under decree by trustees, appointed by the court for that object, the court is regarded as the vendor, with whom the contract of sale is made, through the agency of the trustee. The penalty of the trustee's bond rests in the discretion of the court, and may be enlarged or diminished, according to the circumstances of the case. *Ib.*
 16. A decree cannot be altered, after it has been enrolled, except by a bill of review. *Ib.*
 17. Where a decree is still under the control of the court, if the term has not passed, it may be reheard upon petition. *Ib.*

PRACTICE IN EQUITY.—*Continued.*

18. These rules relate only to the decree, so far as it acts upon the subject of the bill, and have no application to that part of the decree, which is merely directory, as to the mode in which it is to be enforced. *Ib.*
19. Difficulties to be encountered in stating accounts, are no grounds why accounts ought not to be decreed, where the court perceives they are necessary to the rights of the parties, and ends of justice. *Bevans vs. Sullivan, et al.*, 383.
20. The answer of one of the co-defendants, the security in the bond of conveyance, disclosed the fact, that the purchase money, for the land had been paid to the husband of *S*, by the complainant, after his marriage. **HELD**: if such were the case, he could be restrained from recovering the land sold, at law, during his life time; and that the cause ought to be remanded, to give the complainant an opportunity of amending his bill, and claiming an injunction against the husband and wife, during the life of the husband. *Browner and wife, vs. Franklin, et al.*, 463.
21. Upon an appeal against continuing an injunction, if the court of Appeals perceives that the complainant has, and can have, no equity at final hearing, the bill will be dismissed. *Geiger vs. Green*, 472.

PREFERENCE DEEDS.

See DEEDS, 1.

PRESUMPTION OF LAW AND FACT.

1. A plea in bar, to an action on an injunction bond, which set up as a defence to a breach of the condition, that after the writ of injunction obtained against two defendants, both prosecuted with effect their bill, until the death of one; that the survivor also prosecuted with effect, until his death; that no administration had been obtained upon the estate of either, and that afterwards it was so proceeded in, that the said injunction was dissolved by the final order of the court of chancery, is no defence. The courts of law must consider the order of the court of chancery as regularly and legally passed, and will not assume, that the chancery cause, abated by the death of the complainants, contrary to the allegation of the plea. *Lloyd vs. Burgess*, 187.

See JUDGMENT, 5.

LIMITATION OF ACTIONS, 1, 2.

PARTNERSHIP AND PARTNERS, 1.

POSSESSION OF PERSONAL PROPERTY.

See PERSONAL PROPERTY.

SHIPS AND SHIPPING.

PRINCIPAL AND AGENT.

See SHIPS AND SHIPPING.

PROMISSORY NOTES.

See BILLS OF EXCHANGE.

PURCHASER.

1. When a defendant purchased in ignorance of any defect of title, though apprized of the claim of the complainant for a lien on the premises purchased, and took possession and made improvements under the opinion of counsel that the title was clear; and all his acts and the circumstances of the case demonstrate, that at the time of his purchase, and when the improvements were made, he believed his title to be a good one, he is entitled to compensation, as a *bona fide* possessor, for the amount of his melioration and improvements of the estate, beneficial to the true owner. *Jones, Adm'r of Hawkins, et al., vs. Jones*, 87.
2. Where it was the duty of *M*, to have investigated the title to lands, or protect himself against injury, by appropriate covenants, having done neither, the loss is the consequence of his own supineness. *Middlekauff vs. Barrick*, 290.
3. If a purchaser has taken a conveyance, and there be no fraud, he has no remedy, though evicted for want of title, except upon the covenants in his deed. *Id.*

RECEIVER.

See COURT OF CHANCERY, 24, 25.

RELATION,

Of trustees' deed to judicial sale, see TRESPASS, 1, 2, 3, 4.

RELEASE.

1. Where a plaintiff, after an injury sustained in his person from the *tort* of the defendant, agrees with the defendant, or his agent, that in satisfaction of such injury, the defendant should pay the expenses incurred by the plaintiff by his detention, in consequence of his injury, and would furnish him with a free conveyance to his point of destination, and the defendant performs his part of the agreement, the plaintiff cannot recover further damages for the *tort*. *Stockton vs. Frey*, 406.
2. In actions for general and unliquidated damages, the payment and acceptance of a sum of money, as a satisfaction, is a good bar. *Id.*
3. The party aggrieved, may determine the sufficiency or insufficiency of the satisfaction paid and accepted by him. *Id.*

RELIGIOUS CORPORATION.

See CORPORATION.

MANDAMUS.

RENTS AND PROFITS,

Of a deceased debtor's estate, to pay creditors, see COURT OF CHANCERY, 20 to 25.

REPLEVIN.

1. *K* rented a farm from *A*, upon the following terms:—he was to give to *A* one half of every thing that was made. The tenant was to carry all the crops to market, and to pay *A* one-half of the proceeds after sale. Under this contract, *K* made a crop of tobacco, and assigned in writing all his interest therein to *F*, who was to have

REPLEVIN.—*Continued.*

the crop prepared for market and sold, and to pay over to *A* one-half of the nett proceeds. The tobacco was left in the possession of *A*'s agent, and the tenant retained possession of no part thereof, after the execution of his agreement with *F*. **Held:** that the contract between *K* and *A* created the relation of landlord and tenant; that it vested in each a joint interest in the crop, and that neither *K* nor his assignee, could maintain an action of replevin for it against *A*. *Ferrall vs. Kent*, 209.

SALES OF REAL PROPERTY UNDER DECREE.

See COURT OF CHANCERY, 10,—19 to 22.

EVIDENCE, 13, 14, 15.

PRACTICE IN EQUITY, 3 to 7,—14, 15.

TRESPASS, 2.

SATISFACTION.

See RELEASE, for satisfaction of unliquidated damages.

SCIRE FACIAS.

1. Where short copies of judgments upon *sci. fac.*, which recited the names of the original defendants, "*and terre-tenants*," without naming the latter, were filed with an injunction bill, upon a motion to dissolve after answer, the court will infer, that the trustees to whom the original defendants had assigned their land with power to sell, and all their vendees, were returned *terre-tenants*. *Doub vs. Barnes, et al.*, 1.
2. It is upon the ground of contribution, that all the *terre-tenants* are required to be made parties to a *scire facias*; and any one tenant, who is made a party, may plead in abatement, that there are other *terre-tenants* who are not made parties. If he fail to do this, he cannot afterwards have contribution. *Ib.*
3. A judgment against *terre-tenants*, gives the plaintiff a right to sell as much of the land as may be necessary to satisfy his claim; and if any one of the *terre-tenants* is injured, he would have a right to go into equity to compel all with whom he stood in *equali jure*, to contribute: nor is such plaintiff compelled to suspend his execution, until the question of contribution shall be settled between the various defendants at law. *Ib.*
4. In the case of *Murphy vs. Cord*, 12 *Gill & John.*, 182, this court decided, that the lien of a judgment was not lost with the right to issue an immediate execution, and the lien remained for twelve years. *Ib.*
5. Where the debtor aliened lands subject to the lien of a judgment, before the right to issue an immediate execution was suspended, that is, within three years from the date of the judgment, a *scire facias* was unnecessary to affect the *terre-tenants*. *Ib.*
6. But where a *scire facias* was necessary to revive the judgment, whether by death or lapse of time, it was necessary against all the *terre-tenants* whose lands were to be affected by the judgment. *Ib.*
7. To a *scire facias* to revive a judgment, the defendant pleaded in bar his prior arrest upon a *ca. sa.*, his appearance in court at the return

SCIRE FACIAS.—Continued.

of the writ in custody, his being called, and answering in court that he was the party arrested, the refusal of the plaintiff to pray him in commitment, and his offer of himself to the sheriff, and the refusal of the sheriff to receive him into custody; upon general demurrer, held a bar to the writ. *Harden vs. Campbell*, 29.

8. In 1822, a judgment was rendered, which was revived in 1832. In 1842, a second *scire facias* was sued out, by the assignee of the judgment against the original defendant, and his tenants of the land of which he was seized in 1822. This writ was returned *nil*, as to the original defendant; and made known to his terre-tenants, who appeared and pleaded limitations in bar of the writ, to which the plaintiff demurred. The *scire facias* set out the original judgment, and the subsequent proceedings thereon. HELD, that as the *scire facias* did not show at what period the original defendant aliened his land, whether immediately after the original judgment, in 1822, or not until a *fiat* was obtained against him, in 1832, the absence of this necessary averment was fatal to it upon demurrer, as respected the *terre-tenants*, not proceeded against until 1842. *Warfield and Brewer, vs. Keefer*, 265.
9. If the design of a *scire facias* be, to make the land of the original defendant, in the hands of his alienees, liable for a judgment, it is the practice in this State to make both the original defendant and his terre-tenants parties to the writ, by which the judgment is to be revived. *Ib.*

See EXECUTION.

SET-OFF.

1. A set-off means a cross claim. One, therefore, upon which the defendant never could have sued the plaintiff, cannot be used as a set-off. *Annan vs. Houck*, 325.
2. A set-off is confined to mutual debts between the plaintiff and defendant. It is a privilege unknown to the common law. *Ib.*
3. Courts of law, upon application to them, set off a judgment which the defendant has against the plaintiff, against another judgment which the latter has against the former. *Ib.*

SHERIFF.

See ESCAPE.

EXECUTION.

PRACTICE, 19.

SHIPS AND SHIPPING.

1. In an action at law to recover the value of materials furnished to a vessel, it appeared that the plaintiff had sold and delivered them, upon the request of *B*, to whom they were charged on the books of the plaintiff; that a month before, *B* had executed a bill of sale of the vessel to the defendants, who immediately after took the oaths of ownership under the acts of Congress, and had a register executed in their own names, one of them being therein described as mas-

SHIPS AND SHIPPING.—*Continued.*

ter. The vessel sailed on her voyage. The plaintiffs offered in evidence the application of the defendants for insurance on her hull and freight, and the policies issued thereon, dated about a month after the supplies were furnished. The plaintiffs stated, that the object of offering the order for insurance, and the policies in evidence, was to show a continuing title in the defendants to the vessel, from the execution of the bill of sale to the date of the order. HELD, that the evidence was admissible. *Mayhew, et al., vs. Graham and another*, 339.

2. Prior to the 6th October, *B* was the owner of a vessel. On the 15th November, as owner, he chartered her to *H* for a voyage, to be paid freight a sum certain by the month, and agreed to put her in good repair to prosecute the contemplated voyage. On the 10th December, the plaintiffs, at the request of *B*, sold and delivered him supplies for the vessel, on six months' credit. The master of the vessel was appointed by *H*. She performed her voyage, and returned to her port of departure in about eight months. It also appeared, that on the 6th October, *B* executed a bill of sale of the vessel to the defendants, who thereupon subscribed the usual oaths at the custom house, and took out a register in their own names. After the vessel sailed on her voyage, they effected insurance upon her hull and freight, payable to themselves in case of loss. During the months of *October* and *November*, she was in the possession of *B*, and after the charter, in the possession of *H*. The defendants had no possession, and exercised no control over the vessel, until after her return, when they sold her. Immediately after the vessel sailed, the defendants gave *H* notice to pay the freight to them. In an action by the material men, the defendants, for the purpose of showing that they held the title to the said vessel, under the bill of sale, in trust, as a security to pay *B*'s note, dated 7th October, payable at four months, proposed to prove, that *B* was their debtor upon that note; that they, on the 21st January, took an assignment of the charter party from *B*, expressed "to secure such note," the vessel "mentioned therein having been transferred to them before the charter was made," and to prove such note and assignment; that *B* gave the defendants credit for the premium of insurance paid by them; that the freight received by defendants, was credited to *B* by defendants on account of said note, and the proceeds of her sale were likewise credited by them to *B*. HELD, by the county court, that the note, assignment of the charter party, entries of charges and credits on the books of either *B* or the defendants, were inadmissible for the purpose for which they were offered. Affirmed, upon appeal, by a division of this court. *Ib.*
3. Upon the whole evidence, the county court refused to instruct the jury:
 - 1st. That there was no evidence from which the jury might infer, that *B* acted as the agent of the defendants, in purchasing said supplies, or that he had any authority or directions, express or

SHIPS AND SHIPPING.—*Continued.*

- implied, from defendants, to purchase the same on their account.
- 2nd. That although the supplies were delivered for the use of the vessel, yet, if they were sold to *B*, on his own credit, and not upon the credit of the defendants, the plaintiffs cannot recover.
- 3rd. That if sold to *B*, upon his special personal request, the plaintiffs cannot recover, although applied to the use of the legal, general owners, under the bill of sale and register.
- 4th. That if the jury believe, that *B* had the possession and control of the vessel after the date of the bill of sale, and exercised acts of ownership over her, and directed how she should be managed, that he continued to have such possession and control—made the charter party—that *H* appointed the master, and that the defendants never had any possession or control from the time of the execution of the charter, until the completion of the voyage, and in no way interfered with said vessel or charter, except to request *H* to pay them the freight; that then *B* was owner, so far as to be competent to execute the charter, and his stipulations in the charter did not raise any *assumpsit* on the part of the defendants, to pay for the supplies in question.
- 5th. That although the jury may find, the defendants were the legal, general owners of the vessel—took possession of, and sold her after the voyage was completed—assented to the making of the charter, or made no objection to it after it was made, still, if the supplies were furnished, upon request of *B*, in fulfilment of the charter, the plaintiffs cannot recover.
- 6th. That if the jury find that, at the time when the charter was executed, *B*, by the permission of the defendants, had the possession and control of the vessel—had had previous possession and acted as owner, then it was competent for him to make said charter as owner, and to recover the freight thereon for his own use, and was responsible for said supplies, and the defendants were not responsible as general owners, whether the plaintiffs knew that the defendants were such owners or not, provided the supplies were sold to *B*, upon his special request, were charged to him; and the jury believe, that *G*, one of the plaintiffs, advised the defendants to procure the assignment of the charter.
- 7th. That if the jury find, that the legal title to the vessel was in the defendants, *M*, *F*, and *M*; yet, if they believe, they held such title for the use of the firm, *W E M & Co.*, which included another partner, that the firm procured insurance, and requested *H* to pay the freight to said firm, by reason of the beneficial interest they had, and not as general owners, then the fact of obtaining such insurance, is not evidence of such ownership as to charge them, the defendants, as owners.
- 8th. That if the jury find, that *B* never did deliver the actual possession of said vessel to the defendants, or any of them, in pursu-

SHIPS AND SHIPPING.—*Continued.*

ance of the bill of sale, and the defendants never took possession of her until her return—then the title of the defendants was never perfected, so as to render them responsible for any supplies furnished, upon the request of *B*, after the execution of the charter party, while he held possession and had control as owner of said vessel.

- 9th. That if the jury find from the evidence, that the supplies furnished or delivered for the use of the vessel, were sold to *B*, upon his credit, and not upon the credit of the defendants, then the plaintiffs are not entitled to recover, unless the jury find from the evidence, that *D* was the agent of the defendants in purchasing the same from the plaintiffs.

All which refusals were affirmed, upon appeal, by a division of this court.

Ib.

SPECIFIC PERFORMANCE.

1. Where the object of a bill in equity is to obtain specific performance of a contract, and the writ of injunction is prayed for only to protect the property, the subject of the contract, against the wrongful acts of the defendant, pending the contest, and until the right to specific performance shall be determined, that writ cannot be maintained, unless the case presented by the bill, would authorise a court of equity to enforce the contract. *Geiger vs. Green*, 472.
2. Specific performance of a contract, is not a matter of right in the parties, but depends upon the sound and reasonable discretion of the court; is granted or withheld according to the circumstances of the case; and the court must be satisfied, that the contract sought to be enforced is fair, just, and reasonable, equal in all its parts, and founded on an adequate consideration. *Ib.*
3. *O* granted to *R*, "the privilege of digging and moving the ore on that part of my (*O*'s,) place, joining *W* and *P*'s, at twenty-five cents per on, for the privilege of ground; leave also to build a house on said land, the workmanship to cost, &c., the materials to be got on my (*O*'s,) land, at *R*'s expense." This confers the mere privilege of digging ore; is not compulsory; imposed no corresponding obligations on *R*, who might refuse to work the mine, and *O* could not oblige him to work it. It contains no mutual or reciprocal engagements, and cannot be specifically enforced in equity: consequently there was no ground for granting or continuing an injunction upon its stipulations. *Ib.*

See COURT OF CHANCERY.

INFANCY.

STAGE OWNERS.

See COMMON CARRIER.

SUPERSEDEAS.

See INJUNCTION, 6.

TERRE-TENANTS.

1. Where short copies of judgments upon *sci. fac.*, which recited the names of the original defendants, "*and terre-tenants*," without

TERRE-TENANTS.—*Continued.*

naming the latter, were filed with an injunction bill, upon a motion to dissolve after answer, the court will infer, that the trustees to whom the original defendants had assigned their land with power to sell, and all their vendees, were returned *terre-tenants*. *Doub vs. Barnes, et al.*, 1.

2. It is upon the ground of contribution, that all the *terre-tenants* are required to be made parties to a *scire facias*; and any one tenant, who is made a party, may plead in abatement, that there are other *terre-tenants* who are not made parties. If he fail to do this, he cannot afterwards have contribution. *Ib.*

See SCIRE FACIAS.

TRESPASS, ACTION OF.

1. In an action of trespass, *q. c. f.*, the defendants severed in their pleadings; one of them pleaded *non cul*, and *liberum tenementum*. The last plea was denied generally. The plaintiff claimed title under a decree, and as a purchaser from the trustee. The sale was made prior to 1841; ratified in July 1844; and a deed executed by trustee in September 1844. The trespass was committed and the action commenced in February 1844. HELD, that the plaintiff's traverse of the plea, admits the defendant's right to *possession*, should the jury find him entitled to the *freehold*; and that although the record of the decree, apart from the deed from trustee, is not, under the pleadings, admissible evidence of the *possessory right* thereunder, acquired by the plaintiff, yet when offered with such deed, is competent testimony to go to the jury, to show that the freehold is in the plaintiff. *Hunter vs. Hatton and Kendrick*, 115.
2. The trustee's deed does not operate to pass the freehold merely from the time of its execution, but being a conveyance under a judicial sale, upon the principle of relation it operates retrospectively, and vests the freehold in the grantee from the date of the sale. It disproves the plea of *liberum tenementum*, by shewing, that by operation of law, at the time the trespass was committed, the freehold was in the plaintiff. *Ib.*
3. *Liberum tenementum*, is a plea interposed by a defendant for the purpose of trying his right to the freehold; it is not an absolute denial of all colorable right to possession by the defendant. *Ib.*
4. In an action of *t. q. c. f.*, under the general issue of not guilty, the plaintiff is not bound to rely upon the mere fact of his possession, but may also prove the legality thereof, and his title to the premises, and so entitle himself to greater damages, than a mere possessor of the land trespassed upon. *Ib.*

TRUST—TRUSTEE—C. Q. TRUST.

1. Where a deed of trust was made to indemnify the securities of the grantor, as sheriff and collector, one of his deputies, who advanced him money to pay off official defalcations, is not within the terms of the deed. For the debt thus created, the grantor is liable in his individual character. *Wheeler, et al., vs. Stone, et al.*, 39.

TRUST, &c.—*Continued.*

2. Neither is the holder of a bill on the grantor, accepted by him, in favor of such holder, within its terms; though, in fact, drawn by one who had official claims on such grantor: as his official bond would not be liable on the mere acceptance of such a draft. *Ib.*
3. The testatrix, by her will, in 1828, directed her executors to manumit, by deed, all her slaves, whose age and health might be such as their manumission may not be prohibited by law, leaving it in the discretion of the executors to carry such direction into effect, at such time or times as they may judge proper and expedient. Several of her executors renounced the trust, but one of them accepted it. After a lapse of fourteen years, a number of the slaves filed their bill against all the persons alive, named as executors, including the one who took out letters, in which they alleged, that the executors refused to execute to them deeds of manumission, although not prohibited by law, and retained them in servitude for their own profit; that the testatrix left sufficient personal estate to pay her debts, without including the complainants, and no debts unsatisfied. To this bill the defendants demurred. HELD, that the facts disclosed, presented a proper case for the interposition of a court of equity, on the general principles by which that tribunal is governed in the execution of trusts and powers. *Peters, et al., vs. Van Lear*, 249.
4. Trustees have no power to alter the nature and object of the deed appointing them, and under which they derived their powers, nor to dispense with the exact performance of the conditions imposed upon them: neither has a court of chancery such a power. *Dolan and Foy, vs. Mayor & C. C. of Balt.*, 394.
5. If a grantor is competent to make a conveyance, to the uses expressed in a deed, he is equally competent to provide for the restoration of the property to himself and his heirs, on the failure of the grantees to apply it to the purposes of the grant. *Ib.*
6. If the conditions of the deed have not been performed, the whole estate, legal and equitable, will revert to the heirs of the grantor, unless the heirs of the surviving trustee can allege and prove, in a court of equity, such positive agreement on the part of the grantor, or his heirs, or such specific acts of the parties, with distinct knowledge of the grantor, or his heirs, amounting to evidence of such an agreement as would entitle the claimants, by a bill for specific execution of such agreement, to a deed of conveyance, discharged of the condition so violated. *Ib.*

See SHIPS AND SHIPPING, 2.

VENDOR—VENDEE.

1. *M* agreed with *B* and *H*, to sell them lands in *Maryland*, in consideration of which they agreed to deliver to him conveyances which they held, for certain lands in *Illinois*. The contract contained no covenant nor warranty of title. The case, in fact, was clear of fraud or misrepresentation, and the bill did not allege mistake. The purchasers of the *Maryland* property were let into possession. The

VENDOR, VENDEE.—*Continued.*

conveyances of the *Illinois* land to *M*, were delivered. *M*, finding he could not recover possession under them, filed his bill to cancel his agreement with *B* and *H*; and to be restored to his original possession. **HELD**, that a mistake as to title, in which both parties participated, and by which both might be injured, in the absence of warranty, fraudulent misrepresentation, or concealment, would not entitle the complainant to have the contract vacated. *Middlekauff vs. Barrick, et al.*, 290.

2. It was the duty of *M*, to have investigated the title to the *Illinois* lands, or he might have protected himself against injury, by appropriate covenants; having done neither, the loss is the consequence of his own supineness. *Ib.*
3. In this case, the grantors of the deeds for the *Illinois* land were not parties. In their absence, the court could not assume their title of no value, and cancel those deeds. To give relief, by restoring possession of the *Maryland* lands, would be to enable *M* to regain them, while he retained title to the *Illinois* land, and a right to sue on the covenants to him. *Ib.*
4. If a purchaser has taken a conveyance, and there be no fraud, he has no remedy, though evicted for want of title, except upon the covenants in his deed. *Ib.*

As to application of purchase money between vendees and judgment creditors, see COURT OF CHANCERY, 7.

See IMPROVEMENTS, 1 to 4.

VESTED RIGHTS.

See CORPORATION, 1 to 6.

VOLUNTARY PAYMENT.

1. The corporation of the city of *Baltimore*, under the act of 1821, chap. 252, and its ordinances, passed to carry said act into execution, notified the plaintiff to build a wall adjoining his property on *Jones Falls*; and that upon his failure to commence the same before a given day, they would erect the same at his cost. The plaintiff built the wall at his own cost, and then brought his action of *assumpsit* against the city, to recover the amount of his expenditure. **Held**: that although the act of 1821 was void, still, the payments made by the plaintiff were *voluntary*; made with a full knowledge of all the facts and circumstances of the case; in ignorance, only, of his legal rights; without fraud, imposition, or any undue advantage taken of the plaintiff; and therefore, the amount paid could not be recovered back. *Mayor &c., of Baltimore vs. Lefferman*, 425.
2. Where money is voluntarily and fairly paid, with a full knowledge of the facts and circumstances under which it is demanded, it cannot be recovered back, upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party. *Ib.*
3. A payment is not to be regarded as compulsory, unless made to emancipate the person or property, from an actual and existing duress imposed upon it, by the party to whom the money is paid. *Ib.*

VOLUNTARY PAYMENT.—*Continued.*

4. A payment made under an apprehension, or even menace, of an impending distress warrant, would not render it compulsory. *Ib.*

WAIVER,

Of equity, *see* COURT OF CHANCERY, 1.

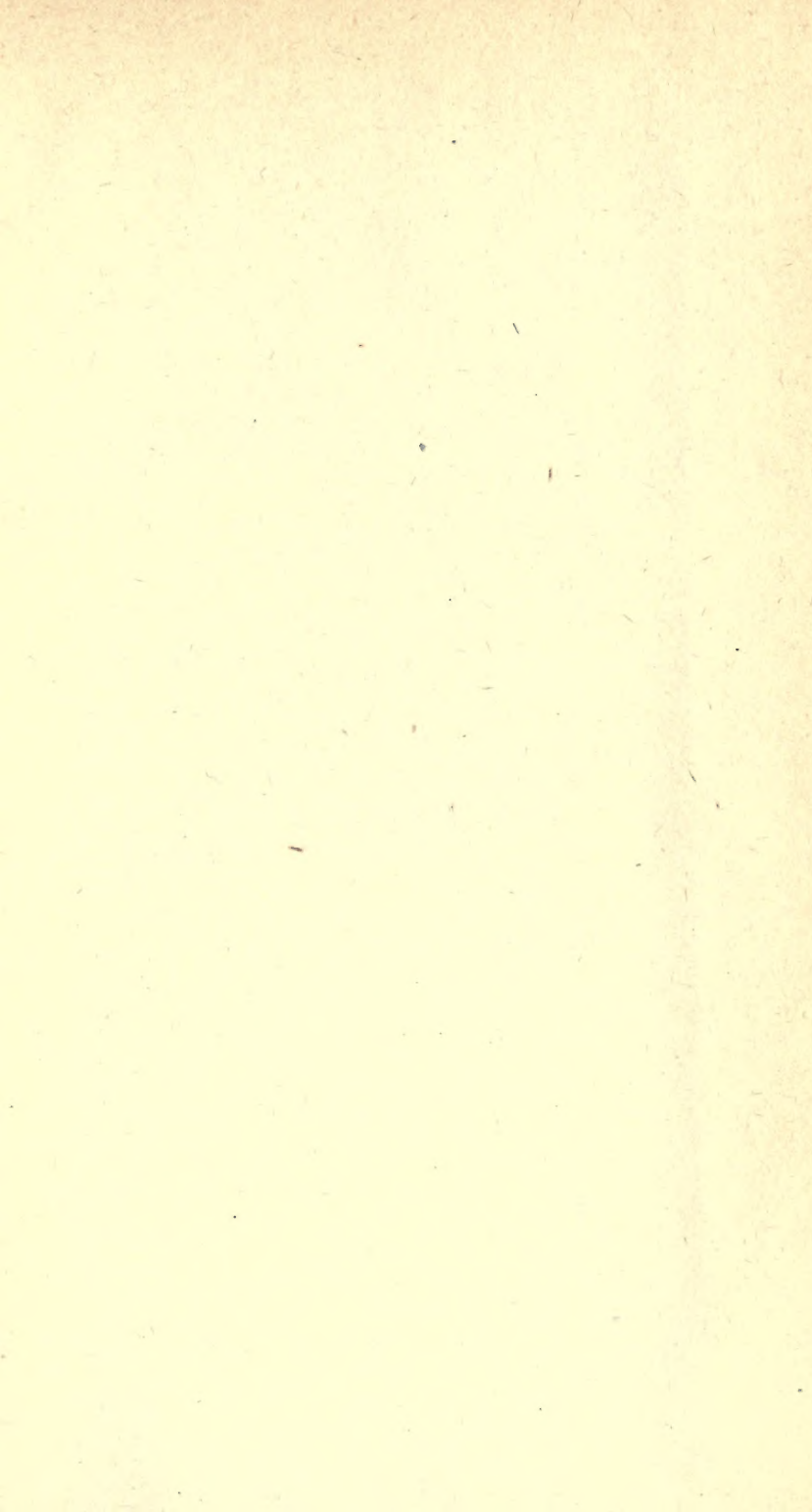
WASTE.

See COURT OF CHANCERY, 25 to 27.

WILL AND TESTAMENT.

1. *H* devised an estate in land to his wife and daughters, for life, with remainder in fee to his son *S*; and in the next clause of his will, gave to his son *J* a sum of money, to be paid to him by *S* in five annual instalments, "the first payment to be made at the end of the first year after he gets possession of the plantation." The devisees for life having died, some of the heirs at law of *S*, and the heirs of *J*, filed a bill, praying a sale of the land, and the proceeds thereof to be distributed among the parties severally entitled thereto. **HELD**: that the legacy when due, was payable to the executors, or administrators, of *J*, and the bill must be filed by them. *Hanson vs. Hanson*, 69.
2. The bill could not be filed until the first payment was due, viz., the end of the first year after the devisee in fee got possession. *Ib.*
3. It would be no defence to such a bill to object, that before a sale can be made, the estate should be divided among the heirs of the devisor; or if incapable of division, that the heir entitled should have a right to elect. *Ib.*
4. The testator, by one clause of his will, directed his three sons, five years after his death, to pay his son *M*, and his daughter *E*, the sum of \$180, that is to say \$90 to each, and to be paid to them in the following proportions, viz: Two of his sons to pay two-fifths each, and the third son to pay one-fifth; on the *sixth* year, \$500 to *P*; and *seven* years after his death, the said three sons to pay, as before, to *M* and *E*, the sum of \$90 each: and so on yearly, and every year, until his daughter *P* shall have received \$1900. By a subsequent clause of his will, he directed his three sons to pay to the children of *E*, at her death, \$1000, and the children of *M*, at his death the sum of \$1500, and the interest on said sum to *M*, during his life, and to *E*, interest on \$1500, during her life, and no longer. **HELD**, that *M* and *E*, were each entitled under this will to the interest of \$90, mentioned in both the said clauses, and that the last legacy was not a substitute for the first. *Cunningham and wife, vs. Spickler, et al.*, 280.
5. Where legacies differing essentially, both as to the time, and mode of payment and amount, are given by different clauses of the same will, to the same parties, they are accumulative. *Ib.*
6. The legacies in the first clause were payable alternately, one year to *M* and *E*, and the next year to *P*, to continue until *P* should receive \$1900. By the subsequent clause, the interest was payable for life only. *Ib.*

WITNESS. *See* EVIDENCE, 3, 4, 5.





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